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No. 21,629

2440

V. 3440

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

STEWART L. UDALL, Secretary of the  
Interior, STATE OF ALASKA,

*Appellants,*

VS.

ANDREW J. KALERAK, JR., et al.,

*Appellees.*

**On Appeal from the United States District Court,  
District of Alaska**

**BRIEF FOR APPELLANT  
STATE OF ALASKA**

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**FILED**

**AUG 23 1967**

**WM. B. LUCK, CLERK**

**AUG 25 1967**







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Interior, STATE OF ALASKA,

*Appellants,*

vs.

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*Appellees.*

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**On Appeal from the United States District Court,  
District of Alaska**

**BRIEF FOR APPELLANT  
STATE OF ALASKA**

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**JURISDICTIONAL STATEMENT**

This appeal originated from decisions of the Anchorage, Alaska office of the Bureau of Land Management accepting a selection application by the State of Alaska and refusing to accept for recordation notices of settlement or occupancy claims of appellees for lands in conflict with the State's selection. Appeal was taken to the Office of Appeals and Hearings, Bureau of Land Management and then to the Secretary of Interior. The District Court had jurisdiction



by reason of the Administrative Procedures Act, 5 U.S.C., Sec. 1001 et seq., and, in particular, 5 U.S.C., Sec. 1009.

Jurisdiction is conferred on this Court by Section 1291, Title 28, U.S.C.

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### STATEMENT OF THE CASE

The Alaska Statehood Act of July 7, 1959 (72 Stat. 339) permitted the State of Alaska to select a quantity of Federal lands within the State to become State lands.

On January 8, 1963, the State of Alaska filed a formal selection application, A-058566, for 26,880 acres of land as part of its allotment under the Statehood Act. (R. 179.) The lands involved were deemed necessary as a future water source for the Greater Anchorage area. At the time of this application the lands were in part subject to paragraph (4) of Public Land Order No. 576 of March 29, 1949, 14 F.R. 1614, withdrawing them from all forms of appropriation for the protection of the water supply of the City of Anchorage. (R. 178.) The State's selection was posted in the appropriate land and status records. (R. 179.)

On April 8, 1963, the Department of Interior issued Public Land Order 3022, 28 F.R. 3661, revoking the withdrawal made by paragraph (4) of Public Land Order 576, *supra*. On the same day, April 8, 1963, the State filed an amendment to its application adding certain acreage to it. Three subsequent amendments



were filed on May 24, 1963, March 13, 1964 and March 17, 1964.

On October 8, 1964, the Land Office at Anchorage issued a decision stating that the selected lands were then segregated from all appropriations under the Public Land Laws and directing the State to publish a notice of its application in an Anchorage newspaper for five consecutive weeks. (R. 181.) This publication was accomplished within the time allowed. (R. 181.)

More than two years after the State's application, on May 27, 1965, Andrew Kalerak, Jr. filed a Notice of Location of Settlement of Occupancy Claim in Alaska, Anchorage 058566. (R. 181.) The Land Office refused to accept the notice for recordation on the grounds it was in conflict with the State's selection. Subsequent claims of the other appellees were rejected on the same grounds.

Kalerak appealed to the Office of Appeals and Hearings where the decision of the Anchorage Land Office was reversed. (R. 29.)

The State of Alaska appealed to the Secretary of Interior and the claims of the other appellees were consolidated at that point. (R. 177.)



## ARGUMENT

### I

THE DISTRICT COURT ERRED IN HOLDING THAT THE PRIMA FACIE VALID APPLICATION OF THE STATE OF ALASKA, WHICH REMAINED OF RECORD, DID NOT SEGREGATE THE LAND IN QUESTION FROM SUBSEQUENT APPROPRIATION.

A decision on the propriety of the rejection of appellee's homestead application by the Land Office requires a careful distinction between selection and segregation as these terms apply to public lands. Even assuming *arguendo* that the State's *selection* was invalid, its application for selection, so long as it remained of record in the Land Office, *segregated* the land from subsequent appropriation and required rejection of appellee's applications. *Bunker Hill v. United States*, 226 U.S. 548, 57 L.Ed. 345 (1913); *Hodges v. Colcord*, 193 U.S. 192, 48 L.Ed. 677 (1905); *McMichael v. Murphy*, 197 U.S. 303, 49 L.Ed. 767 (1905); *Hastings & Dakota Ry. Co. v. Whitney*, 132 U.S. 357, 33 L.Ed. 363 (1889); *Southern Pacific R. Co. v. Ambler Grain & Milling*, 66 F.2d 670 (9th Cir. 1933); *Neff v. United States*, 165 Fed. 273 (8th Cir. 1908); *Germania Iron Co. v. Jones*, 89 Fed. 811 (8th Cir. 1898); *Putnam v. Ickes*, 78 F.2d 223 (D.C. Cir. 1935); *Max L. Krueger*, 65 I.D. 185 (1958); *R. B. Whitaker, et al.*, 63 I.D. 124 (1956); *B. E. Van Arsdale*, 62 I.D. 475 (1955); *Arizona*, 55 L.D. 249 (1935); *Keating v. Doll*, 48 L.D. 199 (1921); *Youngblood v. New Mexico*, 46 L.D. 109 (1917); *Hall v. Oregon*, 32 L.D. 565.

At the time that the appellee's applications for homestead entry were filed, and for approximately



two years prior thereto, the land in question had been within the public domain subject only to the State's formal selection application, A-058566, which application the Land Office had treated as regular, accepted, recorded and posted. In light of the State's prima facie valid application present in the public record the Land Office properly rejected the appellee's application and in doing so it

“ . . . adhered to the rule of long standing that a [state] selection, regular on its face when filed, . . . has the same segregative effect as a homestead or other entry under the general land laws, as against all subsequent claims presented, other than those asserted by the Government, thus withdrawing the land in the meantime from appropriation by later applications. . . .”

*State of New Mexico*, 46 L.D. 217, 222 (1912).

The salutary policy effectuated by the segregation doctrine as applied throughout the history of American land law is demonstrated by the instant case. The purpose of that policy is to accord to all persons an equal opportunity to apply for a portion of the public domain.

As the discussion below examines in greater detail, this rule is founded on the principle that all persons should have an equal opportunity to file for public land. If applications or settlements for lands noted on the public records as covered by a State selection which purports to segregate them were permitted, those who knew that the State selection was defective would have a marked advantage over those who relied upon the records to inform them whether or not the lands



were available. Decision of the Secretary of Interior, below. (R. 188.)

An excellent discussion of the segregation rule and the policy which it advances appears in *Germania Iron Co. v. Jones, supra*, wherein the Secretary of Interior had issued an opinion deciding that the original entry on the lands involved was fraudulent and void and the land open to disposal. Subsequent to the Secretary's decision, but prior to the cancellation of the fraudulent entry on the books of the local land office, James applied for the land. The court held that the original entry, although fraudulent, segregated the lands and that

“... no subsequent entry of the land could be made until that decision (of the Secretary of Interior) was officially communicated to the local land officers, and a notation of the cancellation was made on their plats and records.” 89 Fed. at 815.

The court demonstrated that this rule will assure all who intend to apply for the land an equal opportunity to do so and will prevent those who go behind the public record from gaining an unjust advantage.

The United States Supreme Court in *Hastings & Dakoto Ry. Co. v. Whitney, supra*, cites the first case recognizing the segregation principle and calls it “one of the fundamental principles underlying the land system of this country.” In that case, as here, it was argued that an entry was “invalid on its face” and thus was of no effect. The court held, however, that:

. . . if, notwithstanding these defects [in making entry], the application is allowed by the land officers, . . . and the entry is made of record, such entry may be afterwards cancelled on account of those defects. . . . But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants.

A filing is *prima facie* valid and segregates land covered if it has been entered on the public land records and the decision of the land office to allow it has not been reversed. In this case, the legality of the State's filing was passed on favorably by the land office and its decision was upheld by the Secretary of the Interior.

In two later cases involving the Oklahoma "land rush" the Supreme Court confirmed the principle that a filing segregates land from further appropriation. In both cases claimants entered land in Oklahoma prior to the legally established time of opening of the land for settlement and were therefore not eligible to make a valid entry. However, claimants' entries, although premature, were *prima facie* valid, since *nothing on the face of the record* showed that claimants had entered the land prior to its opening for settlement. In both cases the court found that, while



the claimants gained no rights by their invalid entries, the effect of the entries was to segregate the land.

In *Hodges v. Colcord, supra*, the court held as to the claimant's entry:

This prima facie valid entry removed the land, temporarily, at least, out of the public domain, and beyond the reach of other homestead entries. 193 U.S. at 194.

The other case, *McMichael v. Murphy, supra*, held as to an entryman who entered land while a prior invalid entry stood on the record:

[The second entryman's] entry, having been made at a time when [the first entryman's] entry remained uncanceled, or not relinquished, of record, conferred no right upon him, for the reason that [the first entryman's] entry, so long as it remained undisturbed of record, had the effect to segregate the lands from the public domain and make them not subject to entry. 197 U.S. at 312.

In *Southern Pacific R. Co. v. Ambler Grain & Milling Co., supra*, this Court considered a case where a homestead entry, subsequently abandoned, remained of record at the time of a selection of railroad grant lands. Applying the segregation rule this Court held that the homestead entry segregated the land so that no title could pass to the railroad under the grant from the government notwithstanding the fact that fee title was in the United States when the grant was made.

For other cases sustaining the segregation rule, see *Bunker Hill v. United States, supra*; *Neff v. United States, supra*; and *Putnam v. Ickes, supra*.

Consistent with the foregoing authorities the Department of Interior has repeatedly applied the segregation rule in furtherance of its policy that all persons interested in land should be able to rely upon land office records, and thus have an equal opportunity to apply. Thus, in *Keating v. Doll, supra*, Doll filed a homestead application on a parcel in a National Forest withdrawal and the entry was allowed (by error) by the local land office. When the withdrawal was later revoked and the land became available for entry, the otherwise valid application of Keating was rejected as in conflict with Doll's. The Department ruled that Keating's application was properly rejected because the premature filing of Doll segregated the land so long as it remained of record. Similarly a state school land selection which required approval of the Secretary of Interior was found to segregate the land encompassed pending final consideration by the Secretary and thus required refusal of a subsequent application to purchase under the Timber and Stone Act. *Hall v. State of Oregon, supra*. See also, *Youngblood v. New Mexico, supra*, wherein the Secretary stated:

“Land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of local land office.”

Again in *State of New Mexico, supra*, it is stated

. . . the Department has invariably adhered to the rule of long standing that a [State] selection,



regular on its face when filed, . . . has the same segregative effect as a homestead or other entry under the general land laws, as against all subsequent claims presented, other than those asserted by the Government, thus withdrawing the land in the meantime from appropriation by later applications. . . . 46 L.D. at 222.

Bearing in mind the reason for the segregation rule it becomes apparent that neither the type of application nor its circumstances are determinative of the segregative effect which it is accorded. Thus, in *B. E. Van Arsdale, supra*, a prior noncompetitive oil lease which had been relinquished and cancelled but the cancellation of which had not entered on the official plat records was given segregative effect. The Secretary of the Interior ruled

“ . . . [B]ecause of the importance of making lands available at the same time to all persons who wish to apply for a noncompetitive lease, it is necessary to treat the land as unavailable to anyone for leasing until the cancellation is noted on the tract books of the office which issues the leases. . . . a uniform rule as to when land becomes available for leasing must be strictly enforced to insure all who wish to apply an equal chance to do so.” 62 I.D. at 478.

In order to effectuate the segregation rule, a circular approved by Secretary of Interior Hitchcock and issued July 14, 1899, stated

“ . . . It is hereby directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry

has been cancelled upon the records of the local office.” 29 L.D. 29.

This directive is still in effect.

For other decisions see *Max L. Krueger, supra*; *R. B. Whitaker, supra*.

In the instant case there was in effect at the time the State of Alaska first filed its selection and additional pertinent regulation which described the effect of the State’s action as follows:

Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office properly describing the lands as provided in § 76.9 (a) (3), (4), and (5). Such segregation will automatically terminate unless the State publishes first notice as provided by § 76.17 within 60 days of service of such notice by the appropriate officer of the Bureau of Land Management. 43 C.F.R. 1964 rev., 76.16 (Now 2222.9-5(6).)

Thus, in order to “segregate” land from “all appropriations” the State needed only to file an application for selection properly describing the lands desired. The regulation does not require that the lands applied for be available for filing *at that time*, that they be eligible for selection, or that the selection be finally carried to patent. This regulation affirms the 1899 directive from Secretary of Interior Hitchcock, *supra*, and is consistent with a principle of law which antedates *Hastings & Dakota Ry. Co. v. Whitney, supra*, (1889).



Citing many of the above authorities the Deputy Solicitor, writing the opinion for the Secretary of the Interior below, decided

“These decisions make it abundantly clear that the lands covered by the State [of Alaska] selection, whether or not it was defective, were not open to the initiation of claims by settlement or location and that all attempts to do so were invalid.” (R. 188)

“The just and equitable practice is the one followed by the Department. That is, while the State can gain no advantage by a premature or defective selection, a selection once filed and posted segregates the land until it is rejected and the public land records so noted. Any other course would undermine the Department’s salutary policy of giving all applicants an equal chance to acquire public land.”

“Accordingly the land office, as required by the pertinent regulation, *supra*, properly rejected the notices of settlement or occupancy.” (R. 188)

In reversing the decision of the Secretary of Interior the District Court expressed the erroneous belief that to apply the segregative effect of Section 76.16 C.F.R. in this case would result in an unintended preference right for the State of Alaska. It is apparent that the District Court failed to distinguish between a selection and a segregation, for segregation has no relationship to the validity of the application which brings it into play. Application of the segregation rule in this case merely requires rejection of the appellee’s applications and would not validate the application of the State of Alaska.

The instant case affords a classic example of the policy which the segregation rule advances. Confronted with a state selection application which was valid in form, had been approved by the Land Office and accepted, had been published in an Anchorage newspaper for five consecutive weeks and remained intact on the records of the local land office for nearly two years, a potential applicant who relied upon the record would not be expected to apply. Appellees, however, in reliance on an alleged technical defect, went behind the record and sought to gain a marked advantage over those who relied upon the records to inform them whether or not the lands were available. It was the decision of the Secretary of Interior applying the segregation rule, which served “. . . to enable all who intended to apply for the land to obtain and act upon it without expense, and was fair, fitting, just and reasonable.” *Germania Iron Co. v. Jones, supra*, p. 815. That decision should be affirmed.

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## II

**THE DISTRICT COURT ERRED IN REVERSING THE DECISION OF THE SECRETARY OF INTERIOR THAT THE AMENDMENTS FILED BY THE STATE DURING ITS STATUTORY PREFERENCE RIGHT PERIOD WERE THE EQUIVALENT OF REFILING THE ORIGINAL APPLICATION.**

Subsequent to the issuance of Public Land Order 3022, revoking the withdrawal which had embraced the lands in question, the State of Alaska amended its application four times. Two amendments were filed during the 90 day statutory preference period



and two thereafter. All of these amendments were filed prior to publication of the State's notice of application, and before any of the appellees entered the land or sought to establish any rights to the land by application or settlement.

The Deputy Solicitor decided that the Department of Interior need not insist on a new filing to replace the State's original "premature" one, because a new filing would be an unnecessary formality. The filing of amendments during the preference period demonstrated that the State had exercised its preference right. The Department of Interior held that filing of an amendment to an application is deemed a refiling of the original selection and that the State's rights can be determined as if the original selection had been filed at the time the amendment was filed. Since the State's first two amendments were filed during the preference period, the State exercised its preference right and established its claim to the selected lands.

The Department of Interior has allowed this procedure in similar cases. For example, in *Hunt v. State of Utah*, 59 I.D. 44, 47 (1945), the State filed on land which at the time was in a withdrawal, and on which the State would have no preference right even after its restoration. The Department held that the State gained no priority by its premature filing, but gave effect to the State's selection in the following manner:

It is possible, however, to treat the Commissioner's action in reinstating the [State's] application as a ruling that in the circumstances the filing of a new application would be an unnecessary formality, and that upon reinstatement the

original application should be regarded as having effect only as of the time of such reinstatement and therefore being subject to such rights as Hunt might be deemed to have acquired by his prior [valid] application.

The State's application was deemed filed only at the time of its reinstatement and was subject to any rights which were acquired by a prior application.

In the case of a railroad which had filed on land prior to its availability, the Department, in the absence of intervening rights, allowed the original filing to be treated as valid after the land became available. The railroad was not required to file a second application, even though the first one was invalid. The Department explained:

The railroad company having at all times prior [to the opening of the land] manifested its desire and intent to select the same, it would have been a useless and burdensome requirement to compel the railway company to file new selection papers, practically a duplication of the selection then before the Department. The original [invalid] selection could have been and was allowed as to the tracts free from adverse claim. . . . *Trott v. Northern Pacific Ry. Co.*, 45 L.D. 193, 196 (1916).

Where there are no prior adverse rights to consider the Department of Interior need not insist upon a mere formality.

The practice of allowing a State to file premature applications, so long as this does not prejudice any applicant filing on the day the lands become available, is not a novel one. In *State of California v. Koontz*,



*et al.*, 32 L.D. 648 (1904), state selections filed before land was available were considered as being filed on the day the land became available and after the applications of those present at the land office on opening day.

The Department of Interior in this case held that amendments filed by the State during and after the preference period but nearly two years before the appellees filed, reaffirmed the State's original selection. Since the State had at all times shown its intention to acquire the selected lands, it would serve no purpose to require it to file a duplicate of the application already on file. Thus the Department treated the State's original application as refiled and effective at the time first amendment was filed.

The appellant contends that a fair reading of the decision will demonstrate that the Secretary of Interior reached an entirely reasonable result reflecting sound administrative practice. Nothing in that decision has been shown to be contrary to law and the Secretary's decision should have been affirmed.

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### III

#### THE DISTRICT COURT ERRED IN REVERSING THE DECISION OF THE SECRETARY OF INTERIOR THAT THE STATE'S ORIGINAL APPLICATION COULD BE ACCEPTED.

The fact is unquestioned that at the time the State of Alaska filed its original application, A-058566, most of the land involved was withdrawn pursuant to paragraph 4 of Public Land Order No. 576 of March 29,

1949, 14 F.R. 1614 for protection of the water supply of the City of Anchorage. It is further unquestioned that the Alaska Statehood Act of July 7, 1959 (72 Stat. 339), Section 6(b), allows for selection by the State

“... from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection.”

As a general rule an application filed while land is withdrawn is without effect and does not become effective upon revocation of the withdrawal. To determine whether the general rule should be applied in this case so as to require rejection of the State selection, the decision of the Secretary of Interior examined the practical and theoretical reasons underlying the principle.

The Deputy Solicitor pointed to two objections to allowing applications to be filed for lands before they are open to appropriation. First is the administrative burden such filings would involve. If premature filings on withdrawn land generally were allowed, the public land records would be burdened with thousands of applications which could not possibly be acted on in the foreseeable future. See *J. G. Hathaway, et al.*, 68 I.D. 48, 52 (1961). (R. 189)

Second, it would be inequitable to give effect to a premature application because this would be equivalent to granting an unintended preference right after the land becomes available. The purpose of the rule against premature filing is to assure all members of the public an equal opportunity to file. (R. 189) The



inequity ordinarily involved in allowing a state to file for land while it is still withdrawn is vividly pointed out in *State of Arizona*, A-18816, etc. (Oct. 16, 1935), (see page 15, Decision of Secretary of Interior R. 191). In that case the State filed for lands subject to temporary withdrawal under the Taylor Grazing Act. While conceding that the selection was invalid, the State urged that the selections be allowed to remain of record. The State's theory was that upon revocation of the withdrawal and opening of the land to appropriation by the public, the State's selection would attach instantly and preclude all subsequent applications filed by members of the public.

The problem with Arizona's theory was that this procedure would give the State a preference right for which there was no statutory basis. The Department held:

There is nothing in section 8 of the Taylor Grazing Act [under which the land would be re-opened to entry] which accords preference to the State . . . , and no circumstances appear in connection with these selections that might be deemed equities that could be made the basis of preference if and when the land becomes subject to [appropriation]. Action suspending these [invalid State] selections, for the purpose of effecting segregations in favor of the State the moment the land is released from the withdrawal . . . is tantamount to provisions in the order of restoration that [selections] under section 8 filed by the State shall be preferred over others that may lawfully be filed, a provision for which there is no statutory warrant. *State of Arizona, supra*. (Emphasis added.)

The crux of this decision is that premature filing by the State, if allowed, would in effect have been a grant to the State of a preference right over members of the public *for which there was absolutely no statutory basis*. Allowing a premature filing in such circumstances would, of course, be inequitable.

The reasons for generally applying the rule against premature filing are compelling. The question is whether the reasons for the general rule exist in this case. If the reasons for the rule do not exist here, then the rule is not applicable and a different result may be reached.

Since the State is the only applicant allowed to file “prematurely” under the blanket selection procedure, no undue administrative burden is imposed on the land office. There is, as the decision of the Secretary of Interior below points out, no possibility that hundreds of other applicants will clutter the records with their premature filings.

More significant is whether allowing the State to file “prematurely”, before anyone else, is equitable. Any possibility of inequity is removed by the following fact: *the State of Alaska has a statutory preference right to all lands restored from withdrawal*, granted to it by Section 6(g) of the Alaska Statehood Act (72 Stat. 339). The existence of this statutory preference right distinguishes the State of Alaska’s situation from that of the State of Arizona’s in the decision cited above. Thus the fact that the State was given an opportunity to file on restored land before other persons is in no way inequitable. As the decision of the



Secretary of Interior indicates, use of the “premature” filing merely advanced the time in which the State could make its statutory preference known. Since the State had a statutory preference right, it is not inequitable to allow the State a chance to make its preference known to the Land Office and the public even before desired land was restored to the public domain.

If one purpose of the rule against filing on withdrawn land is to ensure to all equality of opportunity to file, then the rule certainly has no application here. Congress, through the Statehood Act, expressed its intention that there be no equality of filing in the case of restored land, since it gave the State of Alaska a preference right which allows it to prevail over all other applicants, regardless of the order of filing. No one is in the least harmed or disadvantaged if the State is allowed to exercise its preference right by filing prior to the actual restoration of the land.

Clearly the reasons underlying the general rule on premature filing did not apply in this case. Thus the Department exercised its discretion in a reasonable manner in deciding that the rule did not apply and that the State’s selection need not be rejected. This decision is entirely consistent with the intention of Congress that a preference right be granted to the State of Alaska by the Statehood Act. Any other conclusion would deprive the State of this valuable right, contrary to the intent of the Act.

As the Supreme Court of the United States recently demonstrated in *Lassen v. Arizona ex rel. Arizona*

*Highway Department*, 385 U.S. 458 (1967), there is no reason to read the land laws so as to impose restrictions on land transfers in which the abuses which the law intends to prevent are not likely to occur. So here, where no administrative burden will result and where it was intended that the State of Alaska have a preference right in land selection, the rule preventing such should not apply. The decision of the Secretary of Interior reaching this result was entirely reasonable and should not have been reversed.

Dated, Juneau, Alaska,  
August 14, 1967.

Respectfully submitted,

EDGAR PAUL BOYKO,

Attorney General of the State of Alaska,

By DOUGLAS B. BAILY,

Assistant Attorney General of the State of Alaska,

*Attorneys for Appellant*

*State of Alaska.*

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DOUGLAS B. BAILY,

Assistant Attorney General of the State of Alaska,

*Attorney for Appellant*

*State of Alaska.*





No. 21,629

IN THE

United States Court of Appeals  
For the Ninth Circuit

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STEWART L. UDALL, Secretary of the  
Interior, STATE OF ALASKA,

*Appellants,*

VS.

ANDREW J. KALERAK, JR., et al.,

*Appellees.*

On Appeal from the United States District Court,  
District of Alaska

SUPPLEMENT TO BRIEF FOR APPELLANT  
STATE OF ALASKA

---

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On Appeal from the United States District Court,  
District of Alaska

### SUPPLEMENT TO BRIEF FOR APPELLANT STATE OF ALASKA

#### STATEMENT OF THE CASE, continued

The Secretary of the Interior decided that the lands covered by the State selection were not open to the initiation of claims by settlement or location and that all attempts by appellees to do so were invalid in light of the long-standing principle of segregation. (R. 18.)

Second, the Secretary decided that sound administrative and equitable considerations in view of the Interior Department's internal management and the broad Congressional policy implemented by the 90 day preference right provision of the Alaska Statehood Act (72 Stat. 339) led to the conclusion that Alaska's application, although premature, should be accepted. (R. 25.)



The United States District Court at Anchorage, after dutifully finding that the Secretary's decision was arbitrary, capricious, in excess of statutory right and without observance of procedure required by law, etc., reversed. This appeal followed.

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### **SPECIFICATIONS OF ERROR**

#### **I**

The District Court Erred in Holding That the Prima Facie Valid Application of the State of Alaska Which Remained of Record, Did Not Segregate the Land in Question from Subsequent Appropriation.

#### **II**

The District Court Erred in Reversing the Decision of the Secretary of the Interior that the Amendments Filed by the State During Its Statutory Preference Right Period Were the Equivalent of Refiling the Original Application.

#### **III**

The District Court Erred in Reversing the Decision of the Secretary of the Interior that the State's Original Application Could Be Accepted.

Respectfully submitted,

EDGAR PAUL BOYKO,

DOUGLAS B. BAILY,

*Attorneys for Appellant*

*State of Alaska.*

**(Appendices A and B Follow)**

## **Appendices A and B**





## Appendix A

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United States  
Department of the Interior  
Office of the Secretary  
Washington, D.C. 20240

A-30518 : Anchorage 058566, 062515  
State of Alaska : State selection rejected  
Andrew Kalerak, Jr. : Reversed

### APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The State of Alaska has appealed to the Secretary of the Interior from a decision dated July 20, 1965, of the Chief, Office of Appeals and Hearings, Bureau of Land Management, rejecting in part its selection application Anchorage 058566 and reversing a decision dated June 9, 1965, of the Anchorage district and land office refusing to accept for recordation a notice of location of a settlement, Anchorage 058566, submitted by Andrew Kalerak, Jr., for lands in conflict with the State's selection.

In addition, Ray W. McCubbins and 10 others have also appealed to the Director of the Bureau of Land Management from letter decisions of the Anchorage district and land office refusing to accept their respec-



tive notices of settlement or occupancy claims.<sup>1</sup> Because in our view the legal issue governing the disposition of the case on appeal to the Secretary is the same as that in the cases on appeal to the Director, they will be considered and decided with the pending appeal.<sup>2</sup>

The lands selected by the State, a small part of which is also sought by the individual applicants, cover approximately 20,000 acres in Ts. 11 and 12 N., Rs. 1 and 2 W., Seward Meridian, Alaska, most of which had been withdrawn by paragraph (4) of Public Land Order No. 576 of March 29, 1949, 14 F.R. 1614, from all forms of appropriation for the protection of the water supply of the City of Anchorage.

The attempt to transfer the selected lands from the Federal Government to the State began, apparently,

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<sup>1</sup>The names of the applicants, serial numbers, and type of claim are as follows:

	Anchorage		Date Received
Ray W. McCubbins	062524	Homestead	May 28, 1965
Lawrence McCubbins	062558	Homestead	June 7, 1965
*Carl B. Fiscus	062609	Homestead	June 7, 1965
Lawrence J. Wolfgram	062614	Trade & Mfg. Site	June 11, 1965
Lawrence J. Wolfgram	062622	Homestead	June 14, 1965
Ronald L. Thiel	062624	Trade & Mfg. Site	June 14, 1965
Ronald L. Thiel	062625	Homestead	June 14, 1965
Armand C. Sipielman	062627	Homestead	June 15, 1965
Arvil Gary Taylor	062629	Homestead	June 15, 1965
Gerald Baxter	062639	Homestead	June 16, 1965
C. H. Trombley	062649	Homestead	June 17, 1965

\*Fiscus filed a relinquishment of his claim on December 6, 1965.

<sup>2</sup>The Secretary of the Interior may in the exercise of his supervisory authority assume jurisdiction over a case pending on appeal before the Director of the Bureau of Land Management without awaiting a decision by the Director and a subsequent appeal from that decision. *Public Service Company of New Mexico*, 71 I.D. 427 (1964); *U. S. v. M. V. Browning, Administrator*, 68 I.D. 183 (1961).

with a request of March 8, 1962, of the City of Anchorage to the Anchorage land office that these lands be withdrawn for watershed purposes for the protection of the city's water supply. In a letter dated September 28, 1962, to the State Division of Lands, the State office of the Bureau of Land Management said that the city was not a proper applicant for a withdrawal and that most of the land it desired was already withdrawn or otherwise segregated. It then offered as a suggestion for placing the lands in State or local ownership that the State file a blanket selection for the withdrawn lands with an assurance that the selected lands would be classified for watershed purposes. The Bureau would then, the letter continued, request revocation of paragraph (4) of P.L.O. 576 and, when that was done, the State selection would become effective immediately.

The Director of the State Division of Lands informed the land office on January 8, 1963, that the suggested plan was agreeable to the State and the city. On the same day the State filed a formal selection application, A-058566, pursuant to section 6(b) of the act of July 7, 1958, 72 Stat. 739, 48 U.S.C. pp. 9025, 9026,<sup>3</sup> for 26,880 acres of public land.<sup>4</sup>

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<sup>3</sup>Section 6(b) granted to the State and entitled it to select not more than 102,550,000 acres from the public lands which are "vacant, unappropriated, and unreserved at the time of their selection."

<sup>4</sup>In the next 14 months the State filed four amendments adding tracts of various sizes to its selection application. April 8, 1963—950 acres; May 24, 1963—640 acres; March 13, 1964—3,777 acres; March 17, 1964—certain lands restored by P.L.O. 314, 29 F.R. 1327.



In accordance with the regular practice the State's selection was posted in the appropriate land and status records.

On April 8, 1963, the Department issued P.L.O. 3022, 28 F.R. 3661, revoking the withdrawal made by paragraph (4) of P.L.O. 576, *supra*. The order also provided:

“3. Subject to any existing valid rights and the requirements of applicable law, the public lands are hereby opened to settlement and to filing of such applications, selections, and locations as are allowable on unsurveyed lands in accordance with the following:

a. Until 10:00 a.m. on July 8, 1963, the State of Alaska shall have a preferred right to select the lands in accordance with provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 CFR Part 76.

b. All other valid applications and selections under the nonmineral public land laws including applications and offers under the mineral leasing laws for those lands described in Paragraph 1 hereof, presented at or prior to 10:00 a.m. July 8, 1963, will be considered as simultaneously filed at that hour. Rights under such applications and selections filed after that hour will be governed by the time of filing.

4. Persons claiming preference rights based upon valid settlement, statutory preference, or equitable claims must enclose properly corroborated statements in support of their applications, setting forth all facts relevant to their claims.

5. The lands will be subject to the operation of the public land laws generally, including location under the United States mining laws, beginning at 10:00 a.m. on July 8, 1963. The lands described in Paragraph 2 hereof, have been open to applications and offers under the mineral leasing laws.

Inquiries concerning the lands should be addressed to the Manager, Land Office, Bureau of Land Management, Anchorage, Alaska.”<sup>5</sup>

On October 8, 1964, the land office issued a decision directing that the State publish a notice of its application in an Anchorage newspaper for five consecutive weeks.<sup>6</sup>

The publication was carried out within the time allowed, the notice stating:

“Notice is also given that the above described lands have, since these dates [the dates on which the original application and amendments were filed], been segregated from all applications and appropriations under the public land laws, in-

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<sup>5</sup>Section 6(g) of the act of July 7, 1958, *supra*, states in part: “The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective, if subsequent to the admission of Alaska into the Union, during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act \* \* \*.”

<sup>6</sup>The decision stated:

“\* \* \* The selected lands are of a class subject to selection under the Act [sec. 6(b) of the act of July 7, 1958, *supra*] \* \* \*.

“The selected lands are now segregated from all appropriations under the public land laws. This segregation will automatically terminate unless the State publishes first notice of its application within 60 days of receipt of this decision (43 CFR 76.16) [now 43 CFR 2013.9.4].”



cluding settlement under the homestead and similar laws and locations under the mining laws. Settlements and locations initiated on or after these dates are null and void."

About 7 months after first publication, Andrew Kalerak, Jr., on May 27, 1965, filed a Notice of Location of Settlement or Occupancy Claim in Alaska, stating that he had made a settlement under the homestead laws on May 26, 1965, on unsurveyed lands which would probably be the NW $\frac{1}{4}$  sec. 19, T. 12 N., R. 2 W., S.M., Alaska. Kalerak completed Item 5 of the form, which begins: "Improvements on the lands \* \* \*," by inserting: "None, when I settled. I have staked each corner, marked the boundaries, post [sic] the land with a copy of this notice, and placed cement blocks on the land for a start of a foundation."

On June 9, 1965, by a letter-decision the land office held that Kalerak's location notice was unacceptable for recordation because the lands described in his claim were included in a valid selection by the State and therefore were segregated from all applications and appropriations under the public land laws. On appeal, the Office of Appeals and Hearings rejected the State's selection application insofar as it includes lands described in paragraph (4) of P.L.O. 576, *supra*, and reversed the land office decision insofar as it refused to accept the notice of location for recording.

The decision held that on the date that the State filed its original selection application the land described in paragraph (4) of P.L.O. 576, *supra*, was

still withdrawn, that section 6(b) of the act of July 7, 1958, permits selections only from vacant, unappropriated and unreserved land, that on the filing date these lands were not eligible for selection, and that an application filed while land is withdrawn is invalid. The restoration of the lands by P.L.O. 3022, *supra*, it continued, was not effective retroactively, and when the State did not file a new application, or amend its original application to select the lands after they had been restored either during the preference period or thereafter, the lands became available for other application and settlement at the end of the preference period, which was 10:00 a.m. on July 8, 1963. Therefore, it concluded, the land embraced in Kalerak's claim was open to homestead settlement.

The State in its appeal to the Secretary contends that (1) the State relied on the Bureau of Land Management's interpretation of the applicable statute and regulations and that these interpretations can be relied upon and will be accorded great weight by the courts, (2) the State's selection, even if ineffective when filed, is to be considered as filed as of the time the land was opened to entry, and (3) the State can exercise the preference right given it by section 6(g) of the Statehood Act, *supra*, for land unavailable when the State files, to take effect when the land becomes available.

Kalerak, in opposition, maintains that the interpretation of the statute and regulations by the local Bureau office permitting blanket selections of lands whether available or not is erroneous and that no



selections could be made of lands withdrawn by P.L.O. 576 while it was in effect, that the State has not established an administrative interpretation of the statute which is controlling, and that an agreement between the local Bureau office and the State cannot bind or estop the Secretary from making his own independent examination of the merits of the local post office practice, that P.L.O. 3022 did not allow the State to file prior to the revocation of P.L.O. 576 and, finally, that the State, by making the selection on behalf of the city, has violated the prohibition in 6(g) of the Statehood Act, *supra*, which provides that:

“The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State.”

Although the issue on appeal to the Secretary has become the validity of the State's selection insofar as it covers lands formerly in P.L.O. 576, the issue on appeal to the Director in the *Kalerak* case was, and in the 11 other cases being considered here is, whether the notices submitted by the settlers and other appellants should have been accepted for recordation by the land office. The land office refused to accept the notices on the ground that the land described in each of them was segregated by the State selection from all applications and appropriations under the public land laws, including the mining laws. The pertinent regulation provides for the return of the filing fee required to accompany a notice of settlement claim “where the notice is not acceptable to the land office

for recording because the land is not subject to homestead settlement.” 43 CFR 2211.9-1(d).<sup>7</sup>

As far as Kalerak and the other individual applicants are concerned, the issue is whether the land was subject to homestead settlement or to occupancy as a trade or manufacturing site. They contend that the State’s selection is defective because it was filed prematurely, and, that, as a result, the State selection erected no obstacle to their attempts to establish their claims. In other words, they base their position upon the premise that a defective State selection cannot close the land selected to later appropriation.

Before examining the validity of the State’s selection, we will first consider the soundness of the individual applicants’ premise.

At the time the State first filed its selection the pertinent regulation described the effect of the State’s action as follows:

“Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office properly describing the lands as provided in § 76.9(a) (3), (4), and (5). Such segregation will automatically terminate unless the State publishes first notice as provided by § 76.17 within 60 days of service

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<sup>7</sup>Essentially the same provision is found in the homesite and headquarters site regulation, 43 CFR 2233.9-2(e), and in the trade and manufacturing site regulation, 43 CFR 2213.1-1(d).



of such notice by the appropriate officer of the Bureau of Land Management.”<sup>8</sup>

The regulation requires only that the State describe the lands properly to bring into play the segregative effect of its filing; it does not demand that the lands applied be available for filing, that they be eligible for selection, or that the selection be finally carried to patent. The regulation is merely a formal restatement of a rule that the Department has long followed. Keeping in mind that the land office treated the State selection as regular, accepted it, recorded it, and posted it, we find that the Department has held:

“\* \* \* the Department has invariably adhered to the rule of long standing that a selection, regular on its face when filed, \* \* \* has the same segregative effect as a homestead or other entry under the general land laws, as against all subsequent claims presented, other than those asserted by the Government, thus withdrawing the land in the meantime from appropriation by later applications \* \* \*.” *State of New Mexico* (on petition) 46 L.D. 217, 222 (1912), overruled on other grounds by Administrative Order, 48 L.D. 97, 98 (1921); Circular 768, 48 L.D. 172 (1921).”

In a later decision in a case involving a school land indemnity selection, in which after filing it developed that the State had tendered defective base land, the Department reviewed its prior rulings and concluded:

“The effect of filing and allowance of a school land indemnity selection is to segregate the land

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<sup>8</sup>43 CFR, 1964 rev., 76.16; now with minor changes 43 CFR 2222.9-5(b).

selected, even though it may thereafter be found that there are defects which render cancellation necessary, and such a selection, even though erroneously received, segregates the land so that no other application therefore may be received or rights initiated by its tender." *State of Arizona*, 55 L.D. 249 (1935), syllabus.<sup>9</sup>

The Department made a particularly relevant application of the rule in *Youngblood v. State of New Mexico* (on rehearing), 46 L.D. 109 (1917). There the State had filed a school land indemnity selection for land on August 5, 1914. Youngblood alleged that he made a settlement on the land on February 6, 1916, and on February 12, 1916, he filed a homestead application. Thereafter when it was discovered that a portion of the land assigned as base had already been used in another selection, the Commissioner of the General Land Office (now Bureau of Land Management) cancelled the selection in part. The State then filed an application to amend in order to cure the defect.

The Department rejected Youngblood's homestead application and on rehearing stated:

"In the former Departmental decision it was held that inasmuch as the selection was intact and *prima facie* valid at the time Youngblood filed his application, the land was not subject to such application, and, therefore, he gained no rights by filing the same. Furthermore, it was held that his

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<sup>9</sup>Accord: *Hodges v. Colcord*, 193 U.S. 192 (1904); *McMichael v. Murphy*, 197 U.S. 304 (1905); *Joyce A. Cabot et al.*, 63 I.D. 122 (1956); *R. B. Whitaker et al.*, 63 I.D. 124 (1956).



alleged settlement on the land under date of February 6, 1916, was likewise invalid because of the pending State selection, which segregated the land from settlement and entry.

“The decision complained of is in harmony with the recent Departmental decision of March 17, 1917, in the case of *California and Oregon Land Company v. Hulen and Hunnicutt* (46 L.D., 55), wherein it was held:

‘Land segregated from the public domain, whether by patent, reservation, entry, selection, or otherwise, is not subject to settlement or any other form of appropriation until its restoration to the public domain is noted upon the records of local land office.’”

While the cited decisions do not involve the segregative effect of an application or entry improperly allowed because the funds applied for were unavailable, the rule is equally pertinent in that situation. In *Keating et al. v. Doll*, 48 L.D. 199 (1921), the Department held that a homestead entry allowed while the land was still withdrawn as part of a national forest segregated the land and required the rejection of applications filed later although the application for entry was prematurely filed prior to the date set for opening the land to entry and was otherwise defective.

These decisions made it abundantly clear that the lands covered by the State selection, whether or not it was defective, were not open to the initiation of claims by settlement or location and that all attempts to do so were invalid.

As the discussion below examines in greater detail, this rule is founded on the principle that all persons should have an equal opportunity to file for public land. If applications or settlements for lands noted on the public records as covered by a State selection which purports to segregate them were permitted, those who knew that the State selection was defective would have a marked advantage over those who relied upon the records to inform them whether or not the lands were available.

The just and equitable practice is the one followed by the Department. That is, while the State can gain no advantage by a premature or defective selection, a selection once filed and posted segregates the land until it is rejected and the public land records so noted. Any other course would undermine the Department's salutary policy of giving all applicants an equal chance to acquire public land.

Accordingly, the land office, as required by the pertinent regulation, *supra*, properly rejected the notices of settlement or occupancy.

With the claims of the individual applicants removed from the appeal, we may now consider the status of the State's selection.

As we have seen, the Director relied upon the general rule that an application made for land while it is withdrawn is invalid and does not become valid upon the revocation of the withdrawal. *Atherton Sinclair Burlingham et al.*, 71 I.D. 126, 128, 129 (1964); *Hunt v. State of Utah*, 59 I.D. 44 (1945). While this principle is sound and controlling in most similar



situations, it is necessary to examine both the reasons underlying it and Departmental practice to determine whether it requires the rejection of the State's selection here.

There are, it appears, two fundamental objections to allowing applications to be filed for lands before they are open to disposition. One is administrative. As the Department said in refusing to hold in suspense an oil and gas application for lands then unavailable for leasing:

“\* \* \* the rule is founded upon sound administrative practice. It prevents the public land records from being burdened with thousands of applications on which there is no possibility that action can be taken in the foreseeable future. If one person can maintain an application for land not available for leasing several or a hundred can. [Footnote omitted.]

In view of the hundreds of thousands of acres of public land which are not available for leasing for one reason or another, it is plain that the problem of administering premature offers would be considerable. \* \* \*” *J. G. Hatheway et al.*, 68 I.D. 48, 52 (1961).

The second reason is equitable—that is, it avoids giving an applicant a preference right to which he has no right and assures to all the public equality of opportunity to file.

As the Department held in a case involving the rejection of an oil and gas lease offer for lands which the records showed to be in an existing lease which

had in fact terminated and the land then had been leased again and the second lease terminated, all without notation:

“\* \* \* [T]he overriding objective of the rule has been to assure to all the public equality of opportunity to file. This has been stated on many occasions. *Germania Iron Co. v. James*, 89 Fed. 811 (8th Cir. 1898), appeal dismissed, 195 U.S. 638; *George B. Friden*, A-26402 (October 8, 1952); *B. E. Van Arsdale*, 62 I.D. 475 (1955); *E. A. Vaughey*, *supra*; *M. A. Machris, Melvin A. Brown*, 63 I.D. 161 (1956).

“This being the primary objective of the notation rule, to notify the public so that all will have an equal opportunity to file for land, it would be manifestly unfair to say that although there was an outstanding entry of record in the tract book of an oil and gas lease (Evanston 09156 (b)) covering the lands in secs. 2 and 11, no notation of termination of the lease was necessary to open the land to filing because, entirely outside the record, another lease (Wyoming 0257) had been issued and terminated following the termination of the first lease. This would give an unfair advantage to those who by chance knew of the issuance of the second lease. Those who relied on the tract book would have no notice of the second lease but would await the notation of termination of Evanston 09156(b) in the tract book before filing for the land. It would be no answer to say that others could have ascertained the issuance of Wyoming 0257 by checking the serial register and plats. The fact is that the Department has said that the tract book is the record which will be determinative of whether



land is open for filing, and there is no reason why the public should have to resort to other records.” *Max L. Krueger, Vaughan B. Connelly*, 65 I.D. 185, 191 (1958).

In an earlier case in which the Department considered the effect of State exchange applications filed for lands still in a temporary withdrawal, the State, while admitting that the selections were invalid and properly subject to rejection, asked that the selections be allowed to remain of record and that action be suspended until the withdrawal was revoked. In refusing to do so the Department held:

“The obvious purpose in asking for the suspension of these selections is to place the State in a situation where it will have a preferred right to exchanges over others under the provisions of section 8 of the Taylor Grazing Act, the assumption being made that, upon revocation of the withdrawal that now constitutes the bar to the selections, the rights of the State would attach *eo instanti* and shut out all subsequent applicants for the same land which might lawfully be filed under the same section of the act. In other words, these invalid selections would operate as segregation of the land applied for from other appropriation attempted when the land became subject to such filing. To so hold would be in direct conflict with the ruling in *Hendricks v. Damon* (44 L.D. 205), which has been cited and applied in cases without number in the administration of the public land law. There is nothing in section 8 of the Taylor Grazing Act which accords preference to the States in exchanges made thereunder, and no cir-

cumstances appear in connection with these selections that might be deemed equities that could be made the basis of preference if and when the land becomes subject to exchanges. Action suspending these selections, for the purpose of effecting segregations in favor of the State the moment the land is released from the withdrawal of July 9, 1934, is tantamount to provisions in the order of restoration that exchanges under section 8 filed by the State shall be preferred over others that may lawfully be filed, a provision for which there is no statutory warrant. The applications here involved are void and do not become validated by the removal of the withdrawal." *State of Arizona*, A-18816, etc. (October 16, 1935).<sup>10</sup>

The question then is whether the considerations underlying the general rule are pertinent here and, if they are not, whether *cessante ratione legis, cessat et ipsa lex*, a different result should follow.

Examining the problem first again in its administrative aspects to ascertain whether the State's method imposes an undue burden on the land office, we note that the State is the only applicant whom the land office permits to file "prematurely." There is, thus, no likelihood that hundreds of other applicants will clutter the records with their filings.

Considering next the equitable aspects, we observe immediately that the State has a preference right to all land restored from withdrawal, granted to it by

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<sup>10</sup>Accord: *Hunt v. State of Utah*, *supra*, 46-47.



section 6(g) of the act of July 7, 1958, *supra*. Therefore, the fact that the State did get an opportunity to file on the restored land before anyone else is not inequitable or unfair or contrary to the statutory scheme. It merely advanced a bit the time in which the State could make its statutory preference known. Since the State has a statutory preference right, it is not inequitable to give it a chance to take advantage of it.

The force of the other argument—equality of opportunity to all to file—is dissipated by the same reasoning. If the statute intends that there be no equality of filing, then no individual is harmed if the State is allowed to file somewhat sooner than that general practice permits.

Therefore we conclude that in the circumstances there are no reasons of policy which require that the Department reject the State selection.

Furthermore, as we noted earlier, the State amended its application four times, twice within the preference right period and twice thereafter and all before publication and before Kalerak or any of the other appellants sought to establish any rights to the lands in their applications or settlements.

In such circumstances is the Department bound to insist on a new filing to replace the original premature one or can it accept the amendments as a demonstration of the State's interest in its selection and relieve it of the necessity filing anew? We believe that it can.

In *Hunt v. State of Utah*, *supra*, the Department in a somewhat similar situation adopted a solution relieving the State from the necessity of strict compliance with the regular procedure. After holding that the State gained no priority by a premature filing of an application to select certain land, it having no preference right to the land sought, even after restoration of the land, the Department gave effect to the State's selection thus:

“It is possible, however, to treat the Commissioner's action in reinstating the [State's] application as a ruling that in the circumstances the filing of a new application would be an unnecessary formality, and that upon reinstatement the original application should be regarded as having effect only as of the time of such reinstatement and therefore being subject to such rights as Hunt might be deemed to have acquired by his prior [valid] application.” (59 I.D. at 47.)

In other words, although the State's original and only application should have gained it nothing, the Department allowed it to be treated as though it had been filed as of the day the Commissioner purported to reinstate it.

So here the filing of an amendment to an application, in the absence of any reason not to so consider it, can be deemed the refiling of the original selection and the State's rights can be determined as though the original selection had been filed then. Since the first two amendments came within the preference period, the State, then, has exercised its preference



right and has established its claim to the selected lands.

In another case where a railroad had filed an indemnity selection list for lands held by the Department not to be open to such filing, but which were thereafter made available for selection by statute, the Department held that in the absence of intervening rights the original selection list could be treated as valid from the date the Commissioner of the General Land Office instructed the local officers to allow the selection, if otherwise proper, and to require the railroad to submit supplemental lists of tracts which were free from other claims and those to which adverse claims were asserted, despite the fact that a homestead application was filed by another before the railroad filed its supplemental lists. In affirming the validity of the railroad's selection the Department said:

“The selection, in so far as the tracts free from adverse claim were concerned, was, in fact, treated, and properly so, in the nature of a new selection, effective and pending from and after the date of receipt of the Commissioner's letter by the local officers, but not prior thereto.

It devolved upon the Department, as hereinbefore stated, to dispose of said lists under the law then in force and the action taken by the Commissioner was to relieve from suspension the railway selection. The land at the date the Commissioner took that action, being subject to appropriation by the railway company and the

railway company having at all times prior thereto manifested its desire and intent to select the same, it would have been a useless and burdensome requirement to compel the railway company to file new selection papers, practically a duplication of the selection then before the Department. The original selection could have been and was allowed as to the tracts free from adverse claim, as above stated, irrespective of the supplemental lists. The supplemental lists were in nowise a prerequisite of the taking of appropriate action on the original selection under the act of March 3, 1911, *supra*.

It is, therefore, held that movant, not being a party in interest at the date of receipt of the Commissioner's letter of September 30, 1913, by the local officers, will not be heard to question the Department's authority to relieve from suspension the pending railway selection, the disposition of which appears regular and in accordance with the law." *Trott v. Northern Pacific Ry. Co.*, 45 L.D. 193, 196 (1916).

Again we see that the Department need not insist upon a mere formality when there are no adverse rights to be considered. Here the State has at all times shown its intention to acquire the selected lands and it would have served no useful purpose to require it to file a duplicate of the application already on file.

Therefore we conclude that the amendments filed by the State during and after the preference right period were reaffirmations of the State's original selection and, in the circumstances, are to be treated as



though the State had refiled its original application at the time of the amendments.<sup>11</sup>

There remains Kalerak's contention that the State has alienated or bargained away its authority to make selections in violation of the prohibition in 6(g) of the Statehood Act, *supra*. There is no evidence to support this charge. The mere fact that the State is making a selection for land that the city desires does not mean that the State has sold or otherwise disposed of its authority to make this selection or any other.

In his supplemental pleadings on appeal Kalerak has raised several new issues. First, in rebuttal to an assertion of the State, he denies that the lands sought by Kalerak and others are necessary to protect the watershed. This issue is irrelevant, for the validity of the State's selection does not depend on the purpose for which it is made. The statute requires no particular purpose to justify a selection and none is required by the Department. The State's motivations are its own concern.

Next Kalerak urges that the United States District Court for the District of Alaska has already decided

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<sup>11</sup>It is also interesting to note that the practice of allowing a State to file premature applications so long as it did not prejudice any applicant filing on the day the lands became available is not of recent origin. For a time State selections filed prior to the filing of a township plat of survey were recognized as being filed on the proper date and in turn after all those present at the land office at the time of opening on the proper date. *State of California v. Koontz et al.*, 32 L.D. 648 (1904) ; 33 L.D. 643 (1905).

The Department soon formalized its practice by a regulation limiting the State to a period of three days prior to the regular opening day in which to submit premature selections. Regulations paragraph 12, June 23, 1910, 39 L.D. 39, 41 (1910). This provision was later omitted from the regulation, 43 CFR, 1938 ed., 270.12.

the case in *Taylor et al. v. Greater Anchorage Area Borough et al.*, No. A-91-65 Civ., October 15, 1965. This was an action by several homestead settlers or entrymen to enjoin the Borough from restricting the plaintiffs from full enjoyment of their rights under the homestead laws, or, specifically, from preventing the plaintiffs from access to or erecting structures on their homesteads. The Court issued a preliminary injunction effective only against the Borough which it said would "remain in effect until the Department of Interior has determined the dispute now appealed to it by the State of Alaska in the Kalerak case."

The Court emphasized that the injunction would not apply to either the State or Alfred P. Steger, described in the complaint as "Chief Records and Public Service, Anchorage District and Land Office, Bureau of Land Management."

While the Court did say that it found the State's original selection was "invalid against the rights of any others lawfully claiming rights under or against rights to said Federal Land," it also recognized that the issue was before the Secretary on appeal and that it would reexamine the matter when the Department had rendered its decision. In other words, it was not attempting to supersede the Secretary's duty to dispose of the appeal or to substitute its judgment for his. The Secretary remains free to examine the issues and to decide the case in accordance with his understanding of the law.

Finally, Kalerak has requested that an oral argument be held primarily to present his position that the



lands in his entry are not needed to protect the watershed with which the City of Anchorage is so concerned. As we have seen, the controlling issues in the case are legal, not factual, and the issue of whether all or any of the selected lands are part of the watershed is not really material to their resolution. The issues have been extensively briefed and oral argument would add little, if anything, to the written discussions. Therefore Kalerak's request for oral argument is denied.

Pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision of the Chief, Office of Appeals and Hearings, Bureau of Land Management, is reversed and the decisions of the land office refusing to record the several notices of occupancy or settlement are affirmed.

Edward Weinberg,  
Deputy Solicitor.

## Appendix B

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In The United States District Court  
For The District of Alaska

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No. A-35-66 Civil

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Andrew J. Kalerak, Jr., Armand C. Spielman, Ronald L. Thiel, Ray McCubbins, Lawrence McCubbins, Carl B. Fiscus, C. H. Trombley, Arvil Gary Taylor, Pearl Gingerich,

Plaintiffs,

vs.

Stewart L. Udall, Secretary of Interior,  
State of Alaska,

Defendants.

## MEMORANDUM OF DECISION

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The plaintiffs seek judicial review of the final decision of the Secretary of the Department of Interior filed January 20, 1966.

This court has authority to review the Secretary's decision under the Administrative Procedure Act, 5 U.S.C.A. § 1001, et seq.; *Adams v. Witmer*, 271 F.2d 29 (9th Cir. 1959); and *Denison v. Udall*, 248 F. Supp. 942 (D. Ariz. 1965).

The scope of the review authorized by the Administrative Procedure Act is whether the agency's action,



findings, and conclusions were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or without observance of procedure required by law. *Cf. Coleman v. United States*, Opinion No. 20,227, United States Court of Appeals for the Ninth Circuit, June 21, 1966.

On January 8, 1963, while the land here involved was withdrawn from all forms of appropriation by virtue of PLO 576, dated March 29, 1949, 14 Fed. Reg. 1614, an application for selection of such land was filed with the Anchorage Land Office by the State of Alaska.

On April 8, 1963, the Secretary of Interior issued PLO 3022, 24 Fed. Reg. 3661, revoking the withdrawal established by paragraph (4) of PLO 576, *supra*.

During the 90 day period from April 8, 1963, until 10:00 a.m. on July 8, 1963, no selection of the lands involved in this case was made by the State. During the 90 day period the State did amend its application but such amendments merely added to the land described in the January 8, 1963, application and did not mention the land that is here in controversy.

On May 27, 1965, more than 22 months after the expiration of the preference period granted the State by section 6(g) of the Alaska Statehood Act, Andrew Kalerak, Jr., and others filed notices of location of settlement or occupancy claims with the Anchorage Land Office.

Subsequent to the date of the filing of Kalerak's location notice, the State top-filed a blanket selection, Serial No. 062905, over the same area as its first filing, including the area embraced by Kalerak's location notice.

On June 9, 1965, by a letter-decision, the Land Office held that Kalerak's location notice was unacceptable for recordation because the lands described in his claim were included in a valid selection by the State and therefore were segregated from all applications and appropriations under the public land laws. On appeal, the Office of Appeals and Hearings rejected the State's selection application insofar as it included lands described in paragraph (4) of PLO 576, *supra*, and reversed the Land Office decision insofar as it refused to accept the notice of location for recording.

On appeal to the Secretary of Interior the Secretary, on January 20, 1966, reversed the decision of the Chief, Office of Appeals and Hearings, Bureau of Land Management, and affirmed the decisions of the Land Office refusing to record the several notices of occupancy or settlement.

The Secretary in his decision of January 20, 1966, apparently relying on section 76.16 of 43 C.F.R., concluded that the selection filed by the State on January 8, 1963, which was accepted by the Land Office and posted on the public land record, segregated the land from all appropriations based on settlement and location so long as it remained of record, despite the fact



that the selected land was in a withdrawal at the time the State filed its selection.

In his decision the Secretary recognized the general rule that an application made for land while it is withdrawn is invalid and does not become valid upon the revocation of the withdrawal. However, he concluded that the rule against premature filings was adopted for administrative convenience and to insure equality of opportunity to file and where these considerations were not present, amendments to a premature application filed by the State during a statutory preference right period could thereafter be accepted as reaffirmations of the original filing and treated as though the State had refiled its original application at the time of the amendments.

The facts are not in dispute. The parties have each moved for summary judgment on the grounds that there is no genuine issue as to any material fact and that judgment should be entered as a matter of law.

The issues for determination are, (1) whether the application for selection filed by the State of Alaska on January 8, 1963, insofar as it embraced lands withdrawn by PLO 576, *supra*, was a valid selection in accordance with the provisions of the Act of July 28, 1956 (70 Stat. 709, 48 U.S.C.A. § 46-3b), and § 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), hereinafter referred to as the Act, and the regulations in 43 C.F.R. part 76; and (2) whether the State's application of January 8, 1963, segregated the land involved and effectively closed the land to subsequent appropriation.

The function of judicial review of administrative orders is a dispassionate and disinterested adjudication unmixed with any concern as to the success of any of the respective parties. *United States v. Morton Salt Co.*, 338 U.S. 632, 640-641 (1950).

The Act of June 25, 1910, (36 Stat. 847; 43 U.S.C.A. § 141) provides as follows:

“The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States, including Alaska, and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and *such withdrawals or reservations shall remain in force until revoked by him or by an act of Congress.*” (Emphasis supplied.)

Executive Order No. 9337 of April 24, 1943, subsequently superseded by Executive Order No. 10355 of May 26, 1952, authorized the President to delegate to the Secretary of the Interior the authority vested in him by 43 U.S.C.A. § 141.

As stated above, by PLO 576, *supra*, the lands here in controversy were withdrawn from all forms of appropriation under the public land laws. Lands which have been withdrawn for a lawful purpose are not public lands and are to be regarded as excepted from subsequent laws, grants and disposals which do not specially disclose a purpose to include them. The withdrawal created by PLO 576 therefore remained in force until revoked in part by PLO 3022 on April 8, 1963.



The Alaska Statehood Act, *supra*, provided for the admission of the State of Alaska into the Union. Section 4 of the Act provided in part:

As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, . . . .

Section 6(b) of the Act provides:

The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within 25 years after the admission of Alaska into the Union, not to exceed 102,550,000 acres from the *public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection*: . . . (Emphasis supplied.)

Section 6(g) of the Act provides as follows:

*Upon* the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than 90 days before the date on which it otherwise becomes effective, . . . *during which period* the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act . . . . (Emphasis supplied.)

It is readily apparent that section 6(b) and section 6(g) of the Act deal with two vastly different and distinct types or classes of land. Section 6(b) per-

tains to public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection, while section 6(g) pertains to lands which have been withdrawn from all forms of appropriation under the public land laws.

Congress in section 6(g) has stated in clear and unambiguous language that where the land has been withdrawn that *upon* the revocation of the order of withdrawal the State shall have not less than 90 days, *during which period* the State shall have a preferred right of selection. Where, as here, Congress has expressed itself in clear and unambiguous language it must be held to have meant what it plainly expressed.

Nothing is contained in the legislative history of the Act that would indicate that Congress intended that the State, with respect to withdrawn lands, should have any right of preference greater than that expressly set forth in section 6(g). U.S. Code Cong. & Ad. News, 1958, Vol. 2, pp. 2933-3009.

43 U.S.C.A. § 1201 provides that:

The Secretary of the Interior, or such officer as he may designate, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this title not otherwise specifically provided for.

Acting pursuant to this authority the Secretary prescribed certain regulations and published the same in the Federal Register on June 9, 1959, 24 Fed. Reg. 4657.

Section 76.15 of 43 C.F.R. provides in pertinent part as follows:



(a) The acts of July 28, 1956 (see § 76.7), and July 7, 1958 (see § 76.11), provide that upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than 90 days before the date on which it otherwise becomes effective during which period the State of Alaska shall have a preferred right of selection under the acts of 1956 and 1958, . . . .

The language in this regulation is for all intents and purposes identical to that contained in section 6(g) of the Act. The words “upon” and “during which period” are words of common usage and understanding and have no obscure or hidden meaning.

Section 76.16 of part 43 C.F.R. in substance provides that lands desired by the State will be segregated from all appropriations when the State files its application for selection in the appropriate land office. This regulation is valid insofar as public lands of the United States in Alaska which are vacant, unappropriated and unreserved at the time of their selection are concerned. The regulation does not, however, apply to lands that are withdrawn from all forms of appropriation under the public land laws such as those involved in the present case. To so hold would be to add to section 6(g) something vastly different than that expressed or intended by Congress. This would be a distortion of congressional intent rather than an interpretation.

The regulations of an agency of the United States must be within the powers conferred by Congress. If the agency regulations go beyond what Congress has

authorized, they are void. *Federal Maritime Commission v. Anglo-Canadian Shipping Co.*, 355 F.2d 255 (9th Cir. 1964). To extend the segregative effect of section 76.16 of C.F.R. to withdrawn lands as well as to vacant, unappropriated and unreserved lands, would result in a preference right far beyond that contemplated or authorized by Congress in section 6(g) of the Act and would therefore be void.

There is no safer nor better canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses. *Cf. Easson v. C.I.R.*, 294 F.2d 653 (9th Cir. 1961).

It is evident that the Secretary of the Interior experienced no difficulty in understanding the meaning and intent of section 6(g) of the Act and section 76.15 of 43 C.F.R. On April 8, 1963, the Secretary issued PLO 3022, 28 Fed. Reg. 3661, revoking the withdrawal made by paragraph (4) of PLO 576.

PLO 3022, in pertinent part, provides:

By virtue of the authority vested in the President and pursuant to Executive Order No. 10355 of May 26, 1952, it is hereby ordered as follows:

1. Public Land Order No. 576 of March 29, 1949, so far as it withdrew in paragraph numbered four thereof, an area of approximately 17,800 acres in Tps. 11 and 12 N., Rs. 1 and 2 W., Seward Meridian, for the protection of the water Supply of the city of Anchorage, is hereby revoked.

\* \* \* \*

3. Subject to any existing valid rights and the requirements of applicable law, the public lands



are hereby opened to settlement and to filing of such applications, selections, and locations as are allowable on unsurveyed lands in accordance with the following:

a. Until 10:00 a.m. on July 8, 1963, the State of Alaska shall have a preferred right to select the lands in accordance with provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 CFR Part 76.

\* \* \* \*

5. The lands will be subject to the operation of the public land laws generally, including location under the United States mining laws, beginning at 10:00 a.m. on July 8, 1963. . . .

Whether it is appropriate to say that PLO 3022 is the contemporaneous and practical interpretation given section 6(g) of the Act is of no consequence. The significance of PLO 3022 is the fact that therein the Secretary, in clear and precise language, set forth his understanding of the requirements of section 6(g) of the Act.

In *Udall v. Tallman*, 380 U.S. 1 (1965), the Supreme Court of the United States, in discussing the interpretation of executive and public land orders by the Secretary of the Interior, stated as follows (at p. 4):

The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it. . . . (Citations omitted.)

The Court also stated (at p. 16) :

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." . . . . (Citations omitted.)

The Court quoted from its earlier decisions in holding (at pp. 16-17) :

"Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" (Citation omitted.) When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order.

"Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." . . . . (Citation omitted.)

The Secretary's construction, interpretation or statement of his understanding of the express pur-



pose and intent of section 6(g) of the Act and the regulations in 43 C.F.R. part 76, as evidenced by PLO 3022, is the only reasonable one and is wholly consistent with the Act and regulations. It should therefore be controlling, as to the issues to be determined in this case, on this court and the subordinate officials of the Department of Interior.

Had the Secretary thought that section 76.16 of part 43 C.F.R. segregated the lands desired by the State from subsequent appropriation as of the time when the State filed its application for selection, he most assuredly would not, on April 8, 1963, have (1) ordered the lands opened to settlement subject to a 90 day preferred right of selection on the part of the State; (2) ordered that from April 8, 1963, until 10:00 a.m. on July 8, 1963, the State of Alaska had a preferred right to select the lands in accordance with the provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 C.F.R. part 76; or (3) ordered that beginning at 10:00 a.m. on July 8, 1963, the lands would be subject to the operation of the public land laws generally, including location under the United States mining laws.

Regardless of any reliance that the State may have placed on the Bureau of Land Management's interpretation of the statute and applicable regulations prior to April 8, 1963, no reason existed from that day forward to justify reliance on the practices, understanding, notices, agreements or interpretation

which existed between the City, the State and the Bureau of Land Management. Section 6(g) of the Act, section 76.15 of the regulations and the provisions of PLO 3022 specifically and clearly spelled out what steps the State was required to take to obtain a preferred right of selection and the precise period of time within which such right had to be exercised. In view of this, the State cannot seriously contend that it was not necessary for it to comply with the law and to exercise its preferred right of selection during the 90 day period afforded it between April 8, 1963, and 10:00 a.m. on July 8, 1963.

The court concludes as follows:

1. The application filed by the State on January 8, 1963, was not a selection of the lands in accordance with the provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b), and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 C.F.R. part 76.

2. The application filed by the State on January 8, 1963, was at the most only a request that paragraph 4 of PLO 576 be revoked and the application did not segregate the land from subsequent appropriation.

3. The State did not exercise the preferred right of selection afforded it by section 6(g) of the Act, section 76.15 of part 43 C.F.R. and PLO 3022.

4. The application filed by the State on January 8, 1963, was a nullity. The so-called amendments, or additional selections during the 90 day period, which did not embrace the lands selected on January 8, 1963, did not serve to validate the prior void selection.



5. Beginning at 10:00 a.m. on July 8, 1963, the lands became subject to the operation of the public land laws generally, including location under the United States mining laws.

6. Thereafter the plaintiffs' notices of location or occupancy were duly tendered for filing and should now be accepted for recordation.

7. The decision of the Secretary of the Interior filed on January 20, 1966, is not in accordance with law and, under the circumstances reflected by the administrative record, is arbitrary and capricious; in excess of statutory authority and limitations and short of statutory right; and without observance of procedure required by law, and should be set aside.

Accordingly, counsel for plaintiffs, within 15 (fifteen) days from the date of this memorandum of decision, shall prepare, serve and submit for the court's approval an appropriate form of summary judgment reversing the decision of the Secretary of the Interior filed January 20, 1966, and remanding this matter to the Manager of the Anchorage District Land Office for proper recordation on the records of the Land Office and for other action as is necessary to establish the prior claim of the plaintiffs herein for homestead entry and location and trade and manufacturing entry and location, and that such be accepted for recordation in such office and that the decision of the Chief of the Office of Appeals and Hearings of the Bureau of Land Management be affirmed in all regards.

Although certain assertions appearing in the record did not enter into the court's consideration of the

merits of the case, the court makes the following comments with reference thereto.

It is asserted that the State is being deprived of its preferred right by a mere technicality. It appears to the court that a more accurate statement would be that this right was lost by the failure of the State to exercise the right in the manner required by law.

It is also asserted that the State and City of Anchorage will lose irreplaceable watershed land on the basis of what might be considered, at the most, slightly irregular procedure. This is regrettable, if true, but it is not a factor which the court can properly consider in determining the issues presented. It would seem that if, in fact, the lands are necessary for an essential public use or purpose, the State, under its power of eminent domain, as it presently exists, or under appropriate legislative amendments, could acquire the land for watershed purposes.

Raymond E. Plummer  
United States District Judge

Dated and entered: Oct 20 1966

Copies mailed to:

Messrs. Hughes, Thorsness & Lowe

Richard L. McVeigh, U. S. Attorney

Theodore E. Fleischer, Asst. Attorney General

Filed October 20, 1966,

J. M. Kroninger, Clerk.





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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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STEWART L. UDALL, SECRETARY OF THE INTERIOR,  
AND THE STATE OF ALASKA,

Appellants

v.

ANDREW J. KALERAK, ET AL.,

Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

---

BRIEF FOR STEWART L. UDALL,  
SECRETARY OF THE INTERIOR

---

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**FILED**

AUG 24 1967

WM. B. LUCK, CLERK

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AUG 25 1967





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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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Nos. 21629, 21629A

STEWART L. UDALL, SECRETARY OF THE INTERIOR,  
AND THE STATE OF ALASKA,

Appellants

v.

ANDREW J. KALERAK, ET AL.,

Appellees

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

---

BRIEF FOR STEWART L. UDALL,  
SECRETARY OF THE INTERIOR

---

OPINION BELOW

The district court's unreported opinion appears at pages 207-223 of the record. The decision of the Secretary of the Interior is reported at 73 I.D. 1 and appears at pages 7-28 and 177-198 of the record.

JURISDICTION

The district court granted summary judgment for the appellees on October 31, 1966 (R. 224-225). The court had



jurisdiction under 28 U.S.C. secs. 1361 and 1391(e).<sup>1/</sup> Notices of appeal were filed by Stewart L. Udall, Secretary of the Interior, on November 16, 1966, and by the State of Alaska on December 12, 1966 (R. 226, 231). Jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

### QUESTIONS PRESENTED

1. An application selecting land filed by the State of Alaska was accepted by the local land office, posted on the public land records, and notice given by publication. The first question on appeal becomes: whether this selection, so long as it remained of record, segregated the land from subsequent appropriation.

2. The original application for selection was filed and recorded when the land was withdrawn. After the land was released, the State, during its exclusive statutory preference

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<sup>1/</sup> The district court and appellees asserted jurisdiction under the Administrative Procedure Act, 5 U.S.C. sec. 701, et seq formerly 5 U.S.C. sec. 1009 (R. 1, 207). Such a position might find possible support in language of this Court in Coleman v. United States, 363 F.2d 190 (1966), affirmed on rehearing, June 20, 1967, after joinder of the Secretary of the Interior as a party defendant at the suggestion of the court which mooted the case on this issue. We do not agree with this Court's statements in Coleman. Copies of the Government's brief on rehearing in that case have been sent to opposing counsel in the instant case.



period, amended its original application to include additional land. The second question on appeal becomes: whether the Secretary of the Interior could reasonably regard the amendments as a reaffirmation and refiling of the original application.

#### STATUTES AND REGULATIONS INVOLVED

Act of July 7, 1958, 72 Stat. 339-352 (48 U.S.C.) sec.

6(b) provides in pertinent part:

The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred and fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection:

Section 6(g) provides in pertinent part:

\* \* \* Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective \* \* \* during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act, \* \* \*.

43 C.F.R. § 2222.9-5 (1966) provides in pertinent part:

(b) Segregative effect of applications.  
Lands desired by the State under the regulations of this part will be segregated from



all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office properly describing the lands as provided in § 2222.9-3(c)(1) (iii), (iv), and (v).

#### STATEMENT

Appellees brought this action in the district court to overturn a decision of the Secretary of the Interior rejecting their individual applications for certain tracts of land in Alaska (R. 1). The land in controversy is located in Townships 11 and 12 North, Ranges 1 and 2 West, Seward Meridian, Alaska (R. 8). No dispute exists over the facts stated in the Secretary's and the court's decisions. Both sides filed motions for summary judgment (R. 130, 136, 156). The district court granted appellees' motion (R. 224).

The critical facts of this case lie in the following chronological order of events:

1. On March 29, 1949, by Public Land Order 576, 14 F.R. 1614, the land was withdrawn from appropriation by the United States (R. 8, 208).

2. On January 8, 1963, the State of Alaska filed an application (A-058566) for the selection of the land pursuant to section 6(b) of the Act of July 7, 1958, 72 Stat. 339, 48

U.S.C. pp. 9026-9027 (R. 9, 208). The selection was posted in the appropriate land and status records (R. 9).

3. On April 8, 1963, by Public Land Order 3022, 28 F.R. 3661, the Secretary of the Interior revoked the withdrawal of the land and released it for appropriation (R. 9-10, 208). The order provided that Alaska be given a 90-day preference period (to July 8, 1963) to claim the land in accordance with section 6(g) of the Act of July 7, 1958, 72 Stat. 339, 48 U.S.C. pp. 9026-9027.

4. During the 90-day period (between April 8, 1963 and July 8, 1963) Alaska did not file a new claim; however, it amended the original application to include additional land<sup>2/</sup> (R. 9, fn. 4, 22-25, 208, 221). (Appellees make no claim to the additional land.) The State published notice of its application and amendments for five consecutive weeks in accordance with 43 C.F.R. sec. 2013.9-4. (App. infra, pp. 27-29.)

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2/ The application and amendments thereto and published notice are printed in the Appendix, infra, pp. 18-29.



5. Between May 27, 1965 and June 17, 1965, appellees filed notices of location of settlement or occupancy claims of some of the land embraced in the State's original application (R. 7, 208).<sup>3/</sup>

On these facts, appellees' locations were rejected. The local office of the Bureau of Land Management refused to accept appellees' notices for recordation on the grounds that Alaska's selection segregated the lands from subsequent appropriation (R. 2). The Bureau of Land Management, on appeal, reversed the local land office decision on the grounds that the State's application was invalid because it was filed when the land was withdrawn from the public domain (R. 29-31). The Secretary of the Interior, in an appeal by the State, affirmed the decision of the local land office and reversed the Bureau of Land Management on the grounds that Alaska's application--the first application of record--segregated the land from any further

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<sup>3/</sup> Kalerak's application of May 27, 1965, for example, stated that he made a settlement under the homestead laws on May 26, 1965. As to improvements to the land, he asserted on his application (R. 11): "None when I settled. I have staked each corner, marked the boundaries, post [sic] the land with a copy of this notice, and placed cement blocks on the land for a start of a foundation."

appropriation; moreover, the Secretary concluded, Alaska's application was valid (R. 7-28). The district court reversed the decision of the Secretary of the Interior on the grounds that the State's application was invalid (R. 207-223). Judgment was entered on appellees' motion for summary judgment (R. 24). From that judgment, the Secretary of the Interior and the State of Alaska appealed (R. 226, 231).

#### SPECIFICATION OF ERRORS

1. The district court erred in entering judgment for appellees and not granting summary judgment for appellants.
2. The district court erred in reversing the administrative determination of the Secretary of the Interior.
3. The district court erred in asserting jurisdiction under the Administrative Procedure Act.
4. The district court erred in holding that the application for selection filed by the State of Alaska--the first application of record--did not segregate the land described therefrom from subsequent appropriation by the appellees.
5. The district court erred in holding that the application for the selection of land filed by the State of Alaska was invalid.



6. The district court erred in failing to accord any weight to the administrative decision.

### SUMMARY OF ARGUMENT

#### I

The State of Alaska pursuant to the Act of its admission filed an application selecting certain land. The selection was regularly allowed and posted in the appropriate land and status records, and notice by publication was made. While this selection was of public record, the appellees attempted to establish claims to the land. Their claims were rejected by the Secretary of the Interior because Alaska's earlier-filed application for selection segregated the land from subsequent claim by appellees. It is a fundamental principle of public land law that an initial selection or entry, regardless of its validity, when regularly allowed on the public records, segregates that land from subsequent claim.

The district court reversed the administrative determination of the Secretary of the Interior on the grounds that the State's selection was invalid and therefore it could not segregate the land from appellees' claims. This reasoning is erroneous. In essence, the segregation principle is based upon

an application or entry being of public record, and not upon its validity. That is, the rule is based on what the record shows and not whether entries were properly made in the record. Indeed, it is well established that an invalid entry, when made of public record, segregates that land from later entry until it is removed from the records. Thus, the Secretary of the Interior correctly rejected appellees' claims since the public land records showed an earlier selection.

II

In any event, the Secretary did not act arbitrarily in holding valid the State's application. The State filed its application for selection on withdrawn land. When the land was released the State had an exclusive 90-day statutory preference period to select the land. During this period, it amended its application to include additional land, and notice by publication was given. All this was before the appellees established or attempted to establish any claims to the land. The Secretary of the Interior interpreted the amendments as a reaffirmation and revival of the original application in much the same way that a codicil can revive a will. Requiring the State to make another paper filing of the same application would have been a



useless formality. Thus, the Secretary concluded, Alaska's selection was valid.

No possible advantage could be gained by the State in filing an application on withdrawn land since it had a 90-day statutory preference period during which only it could claim the land. Certainly if the State were no longer interested in its original selection, it would have filed new applications for the additional land and not amendments. Further, the notice by publication covered the land described in the original application and in the amendments. The district court implied that had the amendments specifically re-described the land originally described in the original application, then the selection of that land would have been valid. Its quarrel with the State's actions was thus one purely of procedure, not of substance.

Moreover, the court, in reversing the decision of the Secretary of the Interior, was substituting its judgment for that of the Secretary's. This is something strictly forbidden. The Secretary's decision was supported by the evidence, in accord with the statute, and reasonable. It should have been affirmed.

ARGUMENT

I

THE PUBLIC LAND RECORDS SHOW SELECTION  
BY THE STATE AND THUS CLOSED THE LAND  
TO SUBSEQUENT ENTRY

The State's application was allowed and filed by the local land office, posted in the tract books and published.<sup>4/</sup> It was a matter of public record for all to see (R. 9, 11). As such it segregated the land from any subsequent claim or entry. Until that selection would be taken off the tract books, any subsequent claims could have no effect. Thus appellees' entries, on the lands, made at a time when the State's selection was on the records, were accordingly rejected by the Department of the Interior (R. 14-18). The tract book principle applies even if the initial prima facie valid selection or entry is subsequently declared void--the land remains segregated until that entry has been cancelled or set aside.<sup>5/</sup> Hastings and Dakota Railroad Co.

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<sup>4/</sup> The tract books ~~are~~ the official record of federal public surveyed lands upon which entries showing all disposals, partial or complete, are made.

<sup>5/</sup> This principle is formally restated by departmental regulation at 43 C.F.R. sec. 2222.9-5(b) (1966).



v. Whitney, 132 U.S. 357, 360-364 (1889); Hodges v. Colcord, 193 U.S. 192, 194-196 (1904); McMichael v. Murphy, 197 U.S. 304, 310-313 (1905); Holt v. Murphy, 207 U.S. 407, 412-415 (1908); Bunker Hill Co. v. United States, 226 U.S. 548, 549-550 (1913); James v. Germania Iron Co., 107 Fed. 597 (C.A. 8, 1901); Southern Pac. R. Co. v. Ambler Grain & Milling Co., 66 F.2d 670 (C.A. 9, 1933); United States v. Central Illinois Public Service Co., 365 F.2d 121 (C.A. 7, 1966); Joyce A. Cabot, 63 I.D. 122 (1956); R. B. Whitaker, 63 I.D. 124 (1956); State of Arizona, 55 L.D. 249 (1935); Keating v. Doll, 48 L.D. 199 (1921); Youngblood v. New Mexico (on rehearing), 46 L.D. 109 (1917).

In Hastings Railroad Co., 132 U.S. at 361-364, the Court referring to the segregation rule as "one of the fundamental principles underlying the land system of this country," stated (also quoted in Hodges, 193 U.S. at 196):

In the light of these decisions the almost uniform practice of the department has been to regard land, upon which an entry of record valid upon its face has been made, as appropriated and withdrawn from subsequent homestead entry, preemption settlement, sale or grant until the original entry be cancelled or declared forfeited; in which case the land reverts to the government as part of the public domain, and becomes again subject to entry under the land laws.

\* \* \* \* \*

\* \* \* if, notwithstanding these defects [in making an entry], the application is allowed by the land officers, \* \* \* and the entry is made of record, such entry may be afterwards cancelled on account of those defects. \* \* \* But these defects, whether they be of form or substance, by no means render the entry absolutely a nullity. So long as it remains a subsisting entry of record, whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, and therefore precludes it from subsequent grants.

The failure of the district court to apply the tract book principle in this case rests upon its conclusion that Alaska's selection was void. This we believe, was error for two reasons. First, regardless of its validity, the segregation principle applies. As the cases cited above well illustrate, that principle is not based upon the validity of the initial entry or selection, but upon that entry or selection being the one of public record. Second, as we show in Point II, infra, the Secretary was not arbitrary in holding Alaska's selection to be valid.

To validate appellees' entries, as the district court has done, would countervene over a century of Interior practice



and judicial decisions. It would be unjust to allow appellees to seize an advantage over others who abided by the Department's practice and judicial decisions and who may not have attempted to initiate any claim to the land because of the existence of the State's selection of record. Accordingly, the Secretary determined that the land office properly rejected appellees' notice of settlement and occupancy made when the State's selection was on the public land records (R. 14-18).

## II

### ALASKA SELECTED THE LAND WHEN IT FILED AMENDMENTS TO ITS ORIGINAL APPLICATION

The State of Alaska filed its original application on withdrawn land. After the land was released, the State amended its application four times to include additional land (R. 9, fn. 22-25, 208, 221). The State's first two amendments were made within its preference right period and the other two thereafter. The land described in the original application and in the amendments was included in notice by publication (R. 11). This was before appellees ever sought to establish any rights to the land. The amendments had the effect of a reaffirmation and refiling of the original application. The Secretary of the Interior stated (R. 25):

Here the State has at all times shown its intention to acquire the selected lands and it would have served no useful purpose to require it to file a duplicate of the application already on file.

Therefore we conclude that the amendments filed by the State during and after the preference right period were reaffirmations of the State's original selection and, in the circumstances, are to be treated as though the State had refiled its original application at the time of the amendments.

Thus, with the filing of amendments, the original application was revived and the land in controversy selected. Clearly, the filing of amendments during the preference period demonstrated that the State had exercised its preference right. For the Department of the Interior to have insisted upon a new filing to replace the State's original application would have been a mere formality. See, Hunt v. Utah, 59 I.D. 44, 47 (1945); Trott v. Northern Pacific Ry. Co., 45 L.D. 193, 196 (1916); California v. Koontz, 32 L.D. 648 (1904), 33 L.D. 643 (1905). Indeed, under the facts of this case, the issue approaches merely one of labeling. The district court admitted that had the State designated its amendments as application for the original area, and specifically re-described the land originally described in



the original application, it would have conformed to the statutes. Certainly, if the State did not intend to reaffirm its original selection, it would have filed a new application for the additional land and not amendments to the original application. In a somewhat analogous situation, it is established that an invalid will can be revived by a duly executed codicil and the will and codicil are regarded as one instrument speaking from the date of the codicil. Cline v. Larson, 234 Ore. 384 (1963), 383 P.2d 74, 87-89; 95 C.J.S. Wills §303 (1957).

Clearly, no inequity resulted by allowing the State to file its application on withdrawn land. No one could be prejudicially affected when the land was released because the State had an exclusive statutory preference period of 90 days during which there could be no other applicant for the land.

Finally, the decision of the Secretary of the Interior in this matter is, in no sense of the terms, arbitrary or capricious. It was certainly reasonable to construe the amendments as a reaffirmation of the original application, just as a codicil can revive a will. Even granting that the Secretary's construction was not the only reasonable one, it was a reasonable one and should be upheld. Udall v. Tallman, 380 U.S. 1 (1965); Boesche v. Udall, 373 U.S. 472 (1963); Best v. Humboldt Mining Co., 371 U.S. 334 (1963).

### CONCLUSION

For the foregoing reasons, the district court erred in reversing the decision of the Secretary of the Interior. The judgment should be reversed.

Respectfully submitted,

EDWIN L. WEISL, JR.,  
Assistant Attorney General.

RICHARD L. McVEIGH,  
United States Attorney,  
Anchorage, Alaska, 99501.

GERALD J. VAN HOOMISSEN,  
Assistant United States Attorney,  
Anchorage, Alaska, 99501.

ROGER P. MARQUIS,  
WILLIAM M. COHEN,  
Attorneys, Department of Justice,  
Washington, D. C., 20530.

AUGUST 1967

### CERTIFICATE OF EXAMINATION OF RULES

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

William M. Cohen  
WILLIAM M. COHEN



APPENDIX

STATE OF ALASKA  
DEPARTMENT OF NATURAL RESOURCES  
DIVISION OF LANDS  
344 Sixth Avenue  
Anchorage, Alaska  
January 7, 1963

Bureau of Land Management  
Anchorage Land Office  
Sixth and Cordova  
Anchorage, Alaska

Ref: S-1209  
(City of Anchorage  
Watershed)

Gentlemen:

Under the provisions of the Act of July 7, 1958, Section 6 (b) and pursuant to Chapter 169, SLA 1959 application is hereby made for the land described on the attached sheet. (See Exhibit A.)

In support of the application, the applicant hereby certifies that:

This selection is being made under and pursuant to the laws of the State of Alaska, specifically, under the authority of Article II, Section 5 (12), Chapter 169, SLA 1959.

The area described contains approximately 26,800.00 acres. The cumulative acreage of all prior selection lists pending and finally approved for clear-listing or patenting totals 11,919,929.99 acres, and does not exceed the 102,550,000 acres allowed by law.

No portion of the selected land is occupied for any purpose by the U.S., and to the best of my knowledge and belief, the land is unoccupied, unimproved, and unappropriated by any person claiming the land other than the applicant.

The land applied for does extend for more than 160 rods along the shore of any navigable water, and it is requested that this restriction be waived.

There are no known medicinal, hot springs or other waters known to the applicant on the selected lands.

Sincerely yours,

/s/ Roscoe E. Bell  
ROSCOE E. BELL, Director

SDL:

cc: Phil R. Holdsworth, Comm., Dept. of Natural Resources



Page 1

Exhibit A

S.-1209

Anch. 058566

6.1 General Grant Selection (Act of July 7, 1958) Section 6(b)

State of Alaska  
Division of Lands  
344 Sixth Avenue  
Anchorage, Alaska

(City of Anchorage Watershed)

T. 11 N., R. 2 W., Seward Meridian (Unsurveyed)

Sec. 1 (That part outside Chugach National Forest)  
Sec. 2 All  
Sec. 11 All  
Sec. 12 (That part outside Chugach National Forest)

T. 12 N., R. 1 W., Seward Meridian (Unsurveyed)

Sec. 30 (That part West of the divide between Ship Creek  
and Campbell Creek)

T. 12 N., R. 2 W., Seward Meridian (Unsurveyed)

Sec. 7 All	Sec. 23 All
Sec. 8 All	Sec. 24 All
Sec. 9 All	Sec. 25 All
Sec. 15 All	Sec. 26 All
	Sec. 27 All

xxxx

xxxxxxxxxx

Sec. 16 All  
Sec. 17 All  
Sec. 18 All  
Sec. 19 All  
Sec. 20 All  
Sec. 21 All  
Sec. 22 All

Sec. 28 All  
Sec. 29 All  
Sec. 33 All  
Sec. 34 All  
Sec. 35 All  
Sec. 36 All (That part west  
of the divide between Ship  
Creek and Campbell Creek)

Approx. Total 17,800 acres

The above lands withdrawn by Paragraph 4, PLO - 576

Page 2

Exhibit A

S-1209

Anch. 058566

6.1 General Grant Selection (Act of July 7, 1958) Section 6(b)

State of Alaska  
Division of Lands  
344 Sixth Avenue  
Anchorage, Alaska

(City of Anchorage Watershed)

<u>T. 12 N., R. 1 W., Seward Meridian (Unsurveyed)</u>		
Sec. 19:	$W\frac{1}{2}SW\frac{1}{4}, SE\frac{1}{4}SW\frac{1}{4}$	120.00
<u>T. 12 N., R. 2 W., Seward Meridian (Unsurveyed)</u>		
Sec. 3:	$SW\frac{1}{4}NE\frac{1}{4}, NW\frac{1}{4}, S\frac{1}{2}$	520.00
Sec. 4:	A11	640.00
Sec. 5:	A11	640.00
Sec. 10:	A11	640.00
Sec. 11:	$NW\frac{1}{4}NW\frac{1}{4}, S\frac{1}{2}NW\frac{1}{4}, SW\frac{1}{4}, SW\frac{1}{4}SE\frac{1}{4}$	320.00
Sec. 13:	$SW\frac{1}{4}NW\frac{1}{4}, SW\frac{1}{4}, SW\frac{1}{4}SE\frac{1}{4}$	240.00
Sec. 14:	A11	<u>640.00</u>
Total Approx.		3,760.00

The above described lands are presently segregated by the Bureau of Land Management request for withdrawal, Anchorage Serial Number A-042304



Page 3

Exhibit A

S-1209

Anch. 058566

6.1 General Grant Selection (Act of July 7, 1958) Section 6(b)

State of Alaska  
Division of Lands  
344 Sixth Avenue  
Anchorage, Alaska

(City of Anchorage Watershed)

T. 11 N., R. 2 W., Seward Meridian (Unsurveyed)

Sec. 3	A11	640.00	acr
Sec. 4	A11	640.00	
Sec. 10	A11	640.00	
Sec. 14	N $\frac{1}{2}$	<u>320.00</u>	
Total Approx.		2,240.00	

T. 12 N., R. 2 W., Seward Meridian (Unsurveyed)

Sec. 32	A11	640.00
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T. 12 N., R. 3 W., Seward Meridian (Unsurveyed)

Sec. 1	N $\frac{1}{2}$	320.00
Sec. 2	E $\frac{1}{2}$	320.00
Sec. 11	E $\frac{1}{2}$	320.00
Sec. 12	A11	640.00

xxxx

xxxxxxxxxxxx

Sec. 13	A11	<u>640.00</u>
Total Approx.		2,240.00

Total Approx. 26,800.00 acr

(Excluding any prior valid rights, claims or patented lands)

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DATE

---

ACTION TAKEN

January 8, 1963

Application received.

STATE OF ALASKA

William A. Egan, Governor

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LANDS

344 6th Avenue-Anchorage

March 12, 1964

Bureau of Land Management  
Anchorage Land Office  
Sixth and Cordova  
Anchorage, Alaska

Ref: S-1209, City of  
Anch. Watershed  
Anch. 058566

Gentlemen:

Reference is made to State selection application, Bureau of Land Management, Anchorage 058566.

It has been brought to our attention that there are additional open lands within the general boundaries of the selection. The State of Alaska hereby requests that its application be amended to embrace all available lands within the following described townships:

T. 11 N., R. 2 W., SM

Sec. 4: Lots 1, 2, 3, 4, S $\frac{1}{2}$ N $\frac{1}{2}$ , SW $\frac{1}{4}$ , SE $\frac{1}{4}$   
Sec. 5: Lots 1, 2, 3, 4, S $\frac{1}{2}$ N $\frac{1}{2}$ , SW $\frac{1}{4}$ , SE $\frac{1}{4}$   
Sec. 7: Lots 1, 2, 3, 4, E $\frac{1}{2}$ W $\frac{1}{2}$ , NE $\frac{1}{4}$ , SE $\frac{1}{4}$   
Sec. 8: All  
Sec. 9: All  
Sec. 18: Lots 1, 2, 3, 4, E $\frac{1}{2}$ W $\frac{1}{2}$ , NE $\frac{1}{4}$ , SE $\frac{1}{4}$

Containing Approx. 3,777.66 acres

Those lands described in BLM opening order dated Feb. 14, 1964.

Thank you for your co-operation.

Sincerely yours,

ROSCOE E. BELL, Director

By: /s/ John E. Friberg  
John E. Friberg,  
Acting Selection Officer

CMF:bm

cc: Lands & Minerals  
Officer Records



STATE OF ALASKA  
DEPARTMENT OF NATURAL RESOURCES

William A. Egan, Governor

DIVISION OF LANDS

344 6th Avenue-Anchorage

March 13, 1967

Bureau of Land Management  
Anchorage Land Office  
Sixth and Cordova  
Anchorage, Alaska

Ref: S-1209, A-058566  
Anchorage Watershed

Gentlemen:

Reference is made to State selection application,  
Bureau of Land Management, Anchorage 058566.

It has been brought to our attention that there are additional open lands within the general boundaries of the selection. The State of Alaska hereby requests that its application be amended to include those lands restored by P.L.O. 3314 within the following townships.

T. 11 N., R. 2 W., SM

T. 12 N., R. 1 W., SM

Approx. total unknown

Thank you for your co-operation.

Sincerely yours,

ROSCOE E. BELL, Director

By: /s/ John E. Friberg  
John E. Friberg,  
Acting Selection Officer

CMF:bm

cc: Lands & Minerals  
Officer Records

STATE OF ALASKA

William A. Egan, Governor

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LANDS

344 6th Avenue-Anchorage

April 5, 1963

Bureau of Land Management  
Anchorage Land Office  
Sixth and Cordova  
Anchorage, Alaska

Ref: Anch. 058566, S-1209  
(City of Anchorage  
Watershed)

Gentlemen:

Reference is made to State selection application,  
Bureau of Land Management, Anchorage 058566.

It has been brought to our attention that there are  
lands which the State should have selected within the general  
boundaries of the selection application. The State of Alaska  
hereby requests that its selection application be amended to  
include the following described lands:

T. 11 N., R. 2 W., Seward Meridian (Unsurveyed)

Section 14: S $\frac{1}{2}$  320.00 Acres

(See Exhibit A Attached) 630.00

Containing Approx 950.00 Acres

Thank you for your co-operation.

Sincerely yours,

ROSCOE E. BELL, Director

By: /s/ John E. Friberg  
John E. Friberg,  
Acting Selection Officer

JEF:bm

cc: Lands & Minerals  
Officer Records



STATE OF ALASKA

William A. Egan, Governor

DEPARTMENT OF NATURAL RESOURCES

DIVISION OF LANDS

344 6th Avenue-Anchorage

May 23, 1963

Bureau of Land Management  
Anchorage Land Office  
Sixth and Cordova  
Anchorage, Alaska

Ref: Anch. 058566, S-1209

Gentlemen:

Reference is made to State selection application,  
Bureau of Land Management, Anchorage serial number 058566.

It has been brought to our attention that there are  
lands which the State should have selected within the general  
boundaries of the selection application. The State of Alaska  
hereby requests that the selection application be amended to  
include the following described lands:

T. 11 N., R. 2 W., Seward Meridian (unsurveyed)

Sec. 15: A11

640.00 acres

(Excluding any prior valid rights, claims, or patented  
lands)

Thank you for your co-operation.

Sincerely yours,

ROSCOE E. BELL, Director

By: /s/ John E. Friberg  
John E. Friberg,  
Acting Selection Officer

JEF:bm

cc: Lands & Minerals Officer  
Records Section, Div. of Lands

# NOTICE FOR PUBLICATION

Under the provisions of Section 6(b) of the Act of July 7, 1958 (72 Stat. 339-343), as amended, the State of Alaska on January 8, 1963, and subsequent amendments thereto, filed application Anchorage Serial Number 058566, for certain public lands, including the reserved or retained mineral estate from beneath patented lands, located near Anchorage, Alaska, more particularly described as follows:

## T. 11 N., R. 2 W., S.M.

Sec. 1: A11  
Sec. 2: A11  
Sec. 3: A11  
Sec. 4: Lots 1, 2, 3, 4,  $S\frac{1}{2}N\frac{1}{2}$ ,  $S\frac{1}{2}$  (A11)  
Sec. 5: Lots 1, 2, 3, 4,  $S\frac{1}{2}N\frac{1}{2}$ ,  $S\frac{1}{2}$  (A11)  
Sec. 7: Lots 1, 2, 3, 4,  $E\frac{1}{2}$ ,  $E\frac{1}{2}W\frac{1}{2}$  (A11)  
Sec. 8: A11  
Sec. 9: A11  
Sec. 10: A11  
Sec. 11: A11  
Sec. 12: A11  
Sec. 14: A11  
Sec. 15: A11  
Sec. 18: Lots 1, 2, 3, 4,  $E\frac{1}{2}$ ,  $E\frac{1}{2}W\frac{1}{2}$  (A11)

## T. 12 N., R. 1 W., S.M.

Sec. 19:  $W\frac{1}{2}SW\frac{1}{4}$ ,  $SE\frac{1}{4}SW\frac{1}{4}$   
Sec. 30: All West of divide between Ship and Campbell Creeks - All land within  $\frac{1}{4}$  mile of Ship Creek and Campbell Creek



T. 12 N., R. 2 W., S.M.

Sec. 3:	SW $\frac{1}{4}$ NE $\frac{1}{4}$ , NW $\frac{1}{4}$ , S $\frac{1}{2}$
Sec. 4:	A11
Sec. 5:	A11
Sec. 7:	A11
Sec. 8:	A11
Sec. 9:	A11
Sec. 10:	A11
Sec. 11:	NW $\frac{1}{4}$ NW $\frac{1}{4}$ , S $\frac{1}{2}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$
Sec. 13:	SW $\frac{1}{4}$ NW $\frac{1}{4}$ , SW $\frac{1}{4}$ , SW $\frac{1}{4}$ SE $\frac{1}{4}$
Sec. 14:	A11
Sec. 15:	A11
Sec. 16:	A11
Sec. 17:	A11
Sec. 18:	A11
Sec. 19:	A11
Sec. 20:	A11
Sec. 21:	A11
Sec. 22:	A11
Sec. 23:	A11
Sec. 24:	A11
Sec. 25:	A11
Sec. 26:	A11
Sec. 27:	A11
Sec. 28:	A11
Sec. 29:	A11
Sec. 33:	A11
Sec. 34:	A11
Sec. 35:	A11
Sec. 36:	All West of divide between Ship and Campbell Creeks

The above described lands contain a total of approximately 20,000 acres.

One purpose of this notice is to allow all persons claiming the lands adversely to file in this office their objections to issuance of patent to the State. Such persons must serve on the Director, Division of Lands, Department of Natural Resources,

State of Alaska, 344 Sixth Avenue, Anchorage, Alaska, a copy of their objections and furnish evidence of such service to the Anchorage District & Land Office, 555 Cordova Street, Anchorage, Alaska.

Notice is also given that the above described lands have, since these dates, been segregated from all applications and appropriations under the public land laws, including settlement under the homestead and similar laws and locations under the mining laws. Settlements and locations initiated on or after these dates are null and void.





21629

No. ~~21,692~~

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EDWARD L. UDALL, Secretary of  
the Interior, and the State of  
Alaska,

Appellant,

v.

ANDREW J. KALERAK, et al,

Appellee.

On Appeal From the United States District Court,  
District of Alaska

Brief for Appellees,

Andrew J. Kalerak, Jr., et al

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FILED

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

SEWARD L. UDALL, Secretary of  
the Interior, and the State of  
Alaska,

Appellant,

-vs-

ANDREW J. KALERAK, et al,

Appellee.

BRIEF OF APPELLEE

I.

STATEMENT OF JURISDICTION

The District Court's unreported opinion appears at  
pages 207-223 of the record. The decision of the Secretary  
of the Interior is reported at 73 I. D. 1 and appears at  
pages 7-28 and 177-198 of the record.

Appellees brought action in the District Court of the  
District of Alaska, seeking reversal of a decision of the  
Secretary of the Interior rejecting their individual appli-  
cations for settlement or occupancy claims on Alaska lands.





(R. 7-28, 177-198). The District Court granted summary judgment for the appellees on October 31, 1966. (R. 224-225).

The District Court had jurisdiction under the Administrative Procedure Act, 5 U.S.C.A., Sec. 1001, et seq., and, in particular, 5 U.S.C., Sec. 1009. Jurisdiction of this Court rests on 28 U.S.C., Sec. 1291.

The appeal originated in a decision of the Anchorage, Alaska office of the Bureau of Land Management refusing to accept for recordation notices of settlement and occupancy claims of appellees. (R. 209). Appellees appealed to the Office of Appeals and Hearings of the Bureau of Land Management which ruled in their favor (R. 209). Appellants then appealed to the Secretary of the Interior, who reversed the decision of the Office of Appeals and Hearing (R. 209).

#### STATUTES AND REGULATIONS INVOLVED

Act of July 7, 1958, 72 Stat. 339-352 (48 U.S.C.),  
sec. 4, provides in pertinent part:

As a compact with the United States, said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States . . . .





Section 6(a) provides in pertinent part:

For the purpose of furthering the development of and expansion of communities, the State of Alaska is hereby granted and shall be entitled to select, within twenty-five years after the date of the admission of the State of Alaska into the Union, . . . other public lands of the United States in Alaska which are vacant, unappropriated, and unreserved at the time of their selection not to exceed another four hundred thousand acres of land, all of which shall be adjacent to established communities or suitable for prospective community centers and recreational areas.

Section 6(b) provides in pertinent part:

The State of Alaska, in addition to any other grants made in this section, is hereby granted and shall be entitled to select, within twenty-five years after the admission of Alaska into the Union, not to exceed one hundred and two million five hundred fifty thousand acres from the public lands of the United States in Alaska which are vacant, unappropriated and unreserved at the time of their selection.

Section 6(g) provides in pertinent part:

\* \* \* The authority to make selections shall never be alienated or bargained away, in whole or in part, by the State. Upon the revocation of any order of withdrawal in Alaska, the order of revocation shall provide for a period of not less than ninety days before the date on which it otherwise becomes effective \* \* \* during which period the State of Alaska shall have a preferred right of selection, subject to the requirements of this Act, \* \* \*.

C.F.R., Section 2222.95(1966) provides in pertinent part:

(1) (a) State preference right of selection; waivers. The acts of July 28, 1956, (see Sec. 76.7), and July 7, 1958 (see Sec. 76.11), provide that upon the revocation of any order of withdrawal in Alaska,





the order of revocation shall provide for a period of not less than 90 days before the date on which it otherwise becomes effective during which period the State of Alaska shall have a preferred right of selection under the acts of 1956 and 1958, . . .

(b) Segregative effect of applications. Lands desired by the State under the regulations of this part will be segregated from all appropriations based upon application or settlement and location, including locations under the mining laws, when the State files its application for selection in the appropriate land office properly describing the lands as provided in Sec. 2222.9-3(c) (1) (iii), (iv), and (v).

Public Land Order 3022, 28 F.R. 3661, provides in pertinent part:

3. Subject to any existing valid rights and the requirements of applicable law, the public lands are hereby opened to settlement and to filing of such applications, selections, and locations as are allowable on unsurveyed lands in accordance with the following:

a. Until 10:00 a.m. on July 8, 1963, the State of Alaska shall have a preferred right to select the lands in accordance with provisions of the Act of July 28, 1956 (70 Stat. 709; 48 U.S.C. 46-3b) and section 6(g) of the Alaska Statehood Act of July 7, 1958 (72 Stat. 339), and the regulations in 43 CFR Part 76.

\* \* \*

5. The lands will be subject to the operation of the public land laws generally, including location under the United States mining laws, beginning at 10:00 a.m. on July 8, 1963 . . . .





## STATEMENT OF THE CASE

The appellees brought this action in the district court to reverse and set aside a decision of the Secretary of the Interior rejecting their individual applications for certain tracts of land in Alaska ( R. 1). The land in controversy is located in townships 11 and 12 North, ranges 1 and 2 West, Seward Meridian, Alaska (R. 8). Both sides filed motions for summary judgment (R. 130, 136, 156). The District Court granted appellees' motion (R. 224).

Prior to Statehood all the lands in Alaska that were not reserved or withdrawn were considered in the federal public domain and subject to application under the various land laws for mining, homesteading, etc.

On March 29, 1949, by Public Land Order 576, 14 F.R. 114, the land in question was withdrawn from appropriation by the United States government (R. 8, 208).

The 85th Congress on July 7, 1958 adopted Public Law 85-508 to provide for the admission for the State of Alaska into the Union. This Act, 72 Stat. 339, 48 U.S.C. 9026-9027, permitted Alaska, in section 6(b), to select over a twenty-five year period, 102,550,000 acres of land from the public lands of the United States of America in Alaska. Such lands had to be vacant, unappropriated, and unreserved at





the time of their selection.

In order that the State of Alaska might have a preference right of selection following the revocation of any withdrawal order, further provision was made in Section 6(g) of the Statehood Act. This section provided that upon the revocation of any order of withdrawal in Alaska, the State of Alaska would have a preferred right of selection for a period of not less than ninety days before the date on which the withdrawal order would otherwise become effective.

On the 8th of April, 1963, by Public Land Order 3022, 28 F.R. 3661, that portion of Public Land Order 576 pertaining to the lands in question in this litigation, was revoked by the Secretary of the Interior and the land released for appropriation. (R. 9-10, 208.)

As required by Section 6(g) of the Statehood Act, Public Land Order 3022, 28 F.R. 3661, provided that until 12:00 a.m. on July 8, 1963, the State of Alaska had a preferred right to select the lands in accordance with the provisions of section 6(g) of the Act of July 7, 1958, 72 Stat. 339, 48 U.S.C., pp. 9026-9027.

However, on January 8, 1963, while the land involved here was still withdrawn from all forms of appropriation





by virtue of Public Land Order 576, and exactly three months before the revocation of Public Land Order 576, an application (A-058566) for selection of 26,880 acres of land as part of its allotment under section 6(b) of the Statehood Act was filed with the Anchorage Land office by the State of Alaska (R. 178). The state filing was made in response to a request of the City of Anchorage (R. 159). The application stated on its face that the lands were withdrawn by Public Land Order 576. (Appendix A of appellant Udall's brief).

During the ninety-day period from April 8, 1963 until 12:00 a.m. on July 8, 1963, no selection of the lands involved in this case was made by the State of Alaska (R. 208). In addition, no amendment to its January 8, 1963 application was filed by the State wherein the lands claimed by the appellees were described (R. 208).

Between May 27, 1965 and June 17, 1965, more than twenty months after the expiration of the preference period granted the State of Alaska by section 6(g) of the Statehood Act, appellees filed notices of location of settlement or occupancy claims with the Anchorage land office. (R. 7, 208).

Subsequent to the date of the filing of appellees' location notice, the State of Alaska filed a blanket selection,





Serial No. 062905, over the same area as in its filing of January 8, 1963, including the area embraced by appellees' location notices. (R. 209.)

The local office of the Bureau of Land Management refused to accept appellees' notice for recordation on the grounds that the lands described in the claims were included in a valid selection by the State and therefore were segregated from all applications and appropriations under the Public Land laws (R. 2). On appeal, the Bureau of Land Management rejected the State's selection applications insofar as they covered lands described in paragraph 4 of Public Land Order 576, supra, and reversed the land office decision insofar as it refused acceptance of appellees' notices of location for recording (R. 29-31). On appeal to the Secretary of the Interior, on January 20, 1966, the decision of the Chief of the Office of Appeals and Hearings, Bureau of Land Management, was reversed and the decision of the land office refusing to record the several notices of occupancy of settlement was affirmed (R. 7-28). The District Court reversed the decision of the Secretary of the Interior on the grounds that the State's application of January 8, 1963 was a nullity, and that the State had not exercised the preferred right of selection afforded





by Section 6(g) of the Statehood Act. (R. 207-223). The District Court held that the decision of the Secretary of the Interior, filed on January 20, 1966, was not in accordance with law, and was arbitrary and capricious, since it was in excess of statutory authority (R. 207-223). Judgment was entered on appellees' motion for summary judgment (R. 224).





## QUESTIONS PRESENTED

In the opinion of the appellees the only meaningful issues are: (1) whether the application for selection filed by the State of Alaska on January 8, 1963, insofar as it embraced lands withdrawn by Public Land Order 576, was contrary to the provisions of the Alaska Statehood Act and thus a nullity, void ab initio; and (2) whether the decision of the Secretary of the Interior in holding that the premature selection filed by the State of Alaska on January 8, 1963 was valid and segregated the land from appropriation was not in accordance with law and arbitrary and capricious.





## SUMMARY OF ARGUMENT

### I

There can be no question that the District Court had jurisdiction under the Administrative Procedure Act to review the decision of the Secretary of the Interior.

### II

The application for selection of land filed by the State of Alaska on January 8, 1963 was meaningless and void ab initio, inasmuch as it was contrary to the clear and unambiguous language of Sections 6(b) and 6(g) of the Alaska Statehood Act.

Under Section 6(b) of the Statehood Act, the State of Alaska is specifically prohibited from selecting land which is in a withdrawn status. Regarding withdrawn lands, Section 6(g) provides that where an order of withdrawal is revoked the State of Alaska shall have a preferred right of selection during the ninety-day period following the issuance of the order revoking the withdrawal.

Thus, these sections of the controlling statute without any ambiguities provide a procedure by which the State of Alaska may select lands which have been withdrawn from the public domain. Nothing exists in the language of the





Statehood Act or its legislative history which would give any indication that Congress intended the State of Alaska to follow any course with respect to withdrawn lands, except that which is clearly spelled out in the statute.

Because the application filed by the State of Alaska on January 8, 1963 was without authority of law, it was nothing more than a request that paragraph 4 of Public Law Order 576 be revoked.

### III

The Secretary of the Interior, in his decision, avoided any discussion of the statutory language of the Alaska Statehood Act. Instead, he and appellants, in their briefs, put primary reliance on the contention that the land in question was segregated by the action of the State of Alaska when it prematurely filed its selection on January 8, 1963. This is an erroneous and misleading application of law. Under the law as it has developed certain requirements must be met in order to apply the segregation theory. These requirements are not present in the facts of this case.

First, the segregation theory applies only to public lands. At the time Alaska filed its selection on January



8 1963, the land in question was withdrawn, and by definition, not public land.

Second, segregation cannot apply where the selection is void ab initio. In this instance, an attempt was made to select lands which were not yet available and as such contrary to the provisions of the Alaska Statehood Act. Such a selection made without statutory authority is not just invalid and voidable, but void ab initio.

Any application of the segregation theory to the lands in question would result in a preference right far beyond that contemplated or authorized by Congress in Section 6(g) of the Statehood Act.

#### IV

The Secretary of the Interior also relied upon an amendment theory to give validity to the State's selection of the land in question. His conclusion that the amendments filed by the State of Alaska during and after the preference right period were reaffirmations of the State's of the State's original selection and were treated as though the State had refiled its original application at the time of the amendments.

This is nothing more than an attempt to revive the





id selection filing by pulling it up with bootstraps. There is no legal foundation for such a holding and the Secretary's argument is completely misleading. The argument on this point depends entirely on two or three land department decisions which are confusing and without application to the case now before the Court. But more important is the inescapable fact that the amendments never described or covered the land in question.

## V

In making its selection of the land on January 8, 1933, the State was taking action on behalf of the City of Anchorage. It was the City which initiated the proceedings to revoke the existing withdrawal order. Inasmuch as Section 6(g) of the Statehood Act forbids the State of Alaska to alienate its right of selection, this selection is contrary to law and ought to be struck down.

## VI

The Alaska Statehood Act provides a number of types of special grants of land to the State of Alaska in addition to the general grants provided for in Section 6(b). In particular provision, Section 6(a), establishes a method by which the State could select land for the benefit





of its cities. Both Section 6(a), the community land provision, and Section 6(b), the general land selection provision, set a definite limit on the acreage which can be selected under each section. When Alaska used Section 6(b) to acquire land for the benefit of the City of Anchorage, the State was favoring the citizens of Anchorage at the expense of the people of Alaska as a whole, and this was a violation of the Equal Protection Clause of the Fourteenth Amendment.

## VII

The Secretary of the Interior has refused to correctly apply the provisions of the Alaska Statehood Act and has been arbitrary and capricious in his refusal to permit the filing of appellees' valid claims. His decision was not in accordance with law. The decision of the District Court in reversing the Secretary should be affirmed.



## ARGUMENT

### I

THE DISTRICT COURT PROPERLY ASSERTED JURISDICTION TO REVIEW THE DECISION OF THE SECRETARY OF THE INTERIOR UNDER THE ADMINISTRATIVE PROCEDURE ACT.

This Court has recently held that the decisions of the Secretary of the Interior regarding public lands are subject to judicial review under the provisions of the Administrative Procedure Act. Coleman v. United States, 363 F.2d 10, (9th Circ. 1966). See also Adams v. Witmer, 271 F.2d 2 (9th Circ. 1958); and Denison v. Udall, 248 F.Supp. 942 (Ariz. 1965).

### II

UNDER THE STATUTORY LANGUAGE OF THE ALASKA STATEHOOD ACT, THE PREMATURE FILING BY THE STATE OF ALASKA WAS A NULLITY AND WITHOUT EFFECT.

By virtue of paragraph (4), Public Land Order No. 576, March 29, 1949, 14 F.R. 1614, the disputed lands in this case were withdrawn from all forms of appropriation under the public land laws. This withdrawal remained in force until revoked in part by the Public Land Order No. 3022 on April 8, 1963.

The Alaska Statehood Act specifically spells out the





relationship between the federal government and the State of Alaska regarding the lands to be granted to Alaska. Section 4 of the Act provides in part that the State of Alaska disclaims all right and title to any lands not granted or confirmed to the State by or under the authority of the Statehood Act. Section 6(b) of the Act provides that, in addition to other grants, the State is entitled to select within twenty-five years some 102,550,000 acres from the public lands of the United States, in Alaska, which are vacant and unappropriated and unreserved at the time of their selection". Section 6(g) of the Act then provides that upon the revocation of any land order of withdrawal in Alaska the order of revocation shall provide for a ninety day period during which the State of Alaska shall have a preferred right to select public lands.

Here it has been clearly set out that under Section 6(b) of the Act, Alaska may select only land which is vacant, unappropriated or unreserved at the time of the selection from the public lands of the United States. Section 6(g), on the other hand, provides a method by which the State of Alaska may have a preference when lands which have been withdrawn from the public domain are ordered released from their withdrawal status.





Since the lands in question had been withdrawn from the Public Domain until April 8, 1963, the State could not validly select them on January 8, 1963, under Section 6(b). Not only were these lands reserved, but land which is withdrawn is not considered "public land", referred to in Section 6(b). Northern Lumber Co. v. O'Brien, 204 U.S. 190 (1906).

With the applicability of Section 6(b) so clearly spelled out in this case, the State's January 8, 1963 selection must turn upon an interpretation of the language in Section 6(g). Here Congress has stated in clear and unambiguous language, that where land has been withdrawn, upon the revocation of the order of withdrawal, the State shall have not less than ninety days during which to exercise a preferred right of selection. Where Congress has expressed itself in clear and unambiguous language, it must be held to have meant what it plainly expressed. Easson v. C.I.R., 294 F.2d 653 (9th Cir. 1961). Neither the administrative agencies nor the courts are permitted to deviate from strict statutory construction when no ambiguity is present in the controlling statute. Busey v. Deshler Hotel Co., 130 F.2d 108 (6th Cir. 1942). See also Drew v. Lawrimore, 257 F.Supp. 65 (D. S. C. 1966); and Mid-Continent Petroleum Corp. v.



N.L.R.B., 204 F.2d 613 (6th Cir. 1953), cert. den. 346 U.S. 856. This principle of statutory construction has been applied with equal force to the determinations of the Bureau of Land Management on several occasions. Morris v. United States, 174 U.S. 196 (1898); and Burfenning v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 163 U.S. 31 (1895). There is nothing in the legislative history of the Alaska Statehood Act which provides any indication that Sections 6(b) and 6(g) of the Act should be construed in any way except that which appears in the literal words. See House Report No. 624, 1st Sess. 85th Cong. (June 25, 1957). Also see generally Congressional Record, May, June, 1958, 85th Cong. 2nd Sess.

The Secretary of the Interior made no effort to construe the statutory language of Sections 6(b) and 6(g) of the Alaska Statehood Act in his decision. In fact, he relegated all references to these controlling legislative enactments to the footnotes of his decision. (pp. 3-4). Both appellant State of Alaska and appellant Udall appear to recognize this fatal defect in their respective briefs, but neither brief suggests that the Secretary's statutory interpretation as the administrative officer of the Act should carry additional weight with the Court.





Instead, the Secretary relied upon a regulation in effect at the time the State of Alaska first filed its selection as controlling in this instance (p. 9). This regulation, 43 C.F.R., Sec. 2222.9-5(b) (1966), provides in substance that lands desired by the State will be segregated from all appropriations when the House files its application for selection in the appropriate land office. The District Court correctly held that this regulation cannot apply to lands that are withdrawn from all forms of appropriation under the public land laws. It was limited by statutory language to Section 6(a) of the Act, and to apply it to Section 6(g) would add to Section 6(g) something vastly different than that expressed or intended by Congress. While regulations are entitled to consideration in construing an ambiguous statute, a regulation in direct conflict with unambiguous statutory provisions is clearly void. Federal Maritime Commission v. Anglo-Canadian Shipping Co., 335 F.2d 255, (9th Cir. 1964); U. S. v. Maxwell, 278 F.2d 206 (8th Cir. 1960).

The only interpretation of Section 6(g) of the Act by the Secretary took place on April 8, 1963, when he issued Public Land Order 3022, 28 F.R. 3661. In this order, which revoked the withdrawal made by paragraph (4) of Pub-





Public Land Order 576, 14 F.R. 1614, the Secretary expressed a clear interpretation of the meaning and intent of Section 6(g) of the Alaska Statehood Act. In that Order it is stated that "until 10:00 a.m. on July 8, 1963, the State of Alaska shall have a preferred right to select the lands in accordance with the provisions of the Act . . .". This is a clear direction to Alaska that Section 6(g) of the Act requires a filing within the ninety-day preference period and is the only statutory interpretation made by the Secretary to which the decision in Udall v. Tallman, 308 U.S. 1 (1965), i.e., that great deference is to be shown to the interpretation given a statute by the officers or agency charged with the statute's administration, applies.

The District Court correctly held that this interpretation in Public Land Order No. 3022 of April 28, 1963, was the only reasonable interpretation of Section 6(g), (p. 13). Other contrary interpretation by the Secretary would have been unreasonable and therefore arbitrary and capricious, and without weight under the authority of Udall v. Tallman, Boesche v. Udall, 373 U.S. 472 (1963); Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963). However, as pointed out above, the Secretary never even attempted to construe the statutory language of Sections 6(a) and 6 (b).



### III

#### SEGREGATION THEORY RELIED UPON BY THE SECRETARY OF THE INTERIOR IS NOT APPLICABLE TO THE FACTS OF THIS CASE.

Faced with clear legislative direction requiring selection of withdrawn lands by the State within a ninety-day period following the release of the lands, the Secretary of the Interior invoked the so-called segregation theory as the avenue by which he could refuse to record appellees' several notices of occupancy or settlement.

It is clear from the argument above that Section 6 of the Alaska Statehood Act does not permit any filing by the State of Alaska which does not specifically conform to the statute.

It is contended by appellants, however, that when the State's selection application of January 8, 1963 was allowed to be filed in the local land office by posting in the tract book, the land was segregated from subsequent claim and entry regardless of statutory requirements. But a close study of the authorities will reveal that this contention is based upon a faulty understanding of the law and that the segregation theory is not applicable to the State of Alaska's January 8, 1963 filing.

There exists a long line of cases invoking the segre-





tion theory in a number of instances. However, the segregation theory is not without its exceptions as pointed out by this Court in Southern Pacific Ry. Co. v. Ambler Grain & Milling Co., 66 F.2d 670, 674 (9th Cir. 1933).

Appellants have put great faith in Hastings v. Dakota Ry. Co. v. Whitney, 132 U.S. 357 (1889), as a case which upholds the Secretary's reliance on the segregation theory.

In the Hastings and Dakota Ry. Co. case, supra, one Turner, in 1865, filed a homestead affidavit in the local land office. This affidavit failed to state, as required by law, that any member of Turner's family was residing on the land or that any improvement had been placed on the land. Actually, neither requirement was met. The entry was allowed, however, and appeared on the records until 1882, when it was finally cancelled. Subsequently, in 1887, the defendant, Whitney, filed a homestead claim on the same land and received a patent from the government. The question before the court was whether Turner's entry and filing had so segregated the land so as to exclude it from a railroad grant which became effective when the railroad filed its map of definite location in 1867. If the land had been segregated by the entry of Turner then it would not have been part of the public lands in 1867,





and the 1877 homestead entry of Whitney would prevail.

Counsel for the railroad in Hastings and Dakota Ry. Co., supra, contended that the Turner homestead entry was "invalid on its face" because the entry failed to show the settlement and improvements required by law. The court rejected this argument, and appellant State of Alaska has quoted extensively from Hastings, supra, in an attempt to apply the "invalid on its face" language of that case to the Alaska filing of January, 1963. However, if appellant had continued the quote, a clear distinction between Hastings and Dakota Ry. Co., supra, and the case now under consideration would have been evident. The court in Hastings continued:

"In the case before us, at the time of the location of the Company's road, an examination of the tract books . . . would have disclosed Turner's entry as an entry of record, accepted by the proper officers in the proper office, together with the application and necessary money - an entry the imperfections and defects of which could have been cured by supplemental affidavit or by other proof of the requisite qualifications of the applicant. Such an entry attached to the land a right which the road cannot dispute for any supposed failure of the entry-man to comply with all the provisions of the law under which he made his claim." 132 U.S. at 364 (emphasis supplied)

It is clear that Turner's entry could have been cured by a



plemental affidavit or by some other proof of the qualifications of the applicant. But the State of Alaska's objection on January 8, 1963 could not have been cured by any means since it was clearly in violation of the statutory requirement that precluded filing on withdrawn lands and the affirmative requirement to file in the ninety day preference period. While Turner's entry may have been "invalid on its face", it was curable and thus not void ab initio.

A case much more in point than any cited by the appellants is that of Northern Pacific Ry. Co. v. DeLacey, 174 U.S. 622 (1898). In that case, the railroad company filed a map of definite location on March 26, 1884. However, in 1869 one John Fleck had filed a declaratory statement of his intention to purchase the land in question under the preemption laws. Fleck left the land some months later and did not continue to reside on the land. By examination of the current statutes, the Supreme Court in DeLacey, supra, held that claimants of the preemption rights must make proof and payment of lands claimed within thirty months following the date prescribed for filing. The Supreme Court held:

"In such a case as this, where the forfeit-





ure occurs by the expiration of the thirty months within which to make proof and payment, the record shows that the claim has expired; that it no longer exists for any purpose, and therefore it cannot be necessary in order that the law shall have its full operation that acknowledgement of this fact should be made by an officer of the land office. . . . There was no existing claim at the time of the filing of the map of definite location . . . . It had expired and had become wholly invalid by operation of law. The thirty months had expired years before the filing of this map . . . . 174 U. S. at 633-34.

The Supreme Court went on to distinguish DeLacey from  
case such as Hastings and Dakota Ry. Co., supra, by stat-  
ing:

A case of this kind, which simply necessitates a reference to the record to ascertain whether the filing has expired and with it the rights of the claimant, differs from the case where the filing may have become subject to cancellation; but the record does not show it, and the right to cancel depends upon evidence be found dehors the record. In such case, while the facts might invalidate the claim, yet as they are not of record and required to be ascertained, the claim itself, though possibly not enforceable, is still an existing claim within the meaning of the law, and it would remain such until cancellation had taken place or some other act done legally terminating existence of the claim.

Upon the facts as found in this case, it seems to us that there was no claim against the land at the time of the passage of the Act of 1864, and years before the time of the filing of the map of definite location





1884 the claim that once existed (in 1869) in favor of Flett had ceased to exist in fact and in law, and the title of the land passed to the railroad company by virtue of the grant contained in the Act of 1864 and by reason of the filing of its map of definite location March 26, 1884. 174 U.S. at 637-38.

In the case now under consideration by this Court, the selection of land by Alaska prior to the revocation of the withdrawal order made that selection by operation of law a nullity. As with the DeLacey case, supra, the law forfeited the right and canceled the entry just as effectively as if that fact were evidence by an entry upon the record. Since the Alaska selection entry contained notice that the lands were in a withdrawal state, no evidence dehors the record was necessary. The Alaska land selection was not just invalid on its face, it was void on its face.

The holding of Northern Pacific Ry. Co. v. DeLacey, supra, was later affirmed by the United States Supreme Court in Oregon and California Ry. Co. v. United States, 190 U.S. 86 (1902), a case involving the Oregon Donation Acts. In Oregon and California Ry. Co., the Supreme Court discussed both Hastings and Dakota Ry. Co. v. Whitney, supra, and Northern Pacific Ry. Co. v. DeLacey, supra, and applied the reasoning of the latter case. See also, Union Pacific Ry.



C. v. Fisher, 28 L.D. 75 (1899); Union Pacific Ry. Co.  
Hartwich, 26 L.D. 680 (1898); St. Paul, Minneapolis and  
Manitoba Ry. Co., 23 L.D. 539 (1896).

The Secretary of the Interior acknowledged in his decision that there was a general rule in the Lands Department establishing that an application made for land while it is withdrawn is invalid and does not become valid upon the revocation of the withdrawal. Atherton Sinclair Burgham, et al., 71 L.D. 126, 128, 129 (1964); Hunt v. State of Utah, 59 L.D. 44 (1945). However, the Secretary, after purporting to examine the reasons underlying this rule, determined that the general rule did not require the rejection of Alaska's January 8, 1963 selection. This determination by the Secretary fails to take into consideration the United States Supreme Court decision in Northern Lumber Company v. O'Brien, supra.

In the Northern Lumber case certain lands were withdrawn from the public domain for a possible railroad route of the Lake Superior and Mississippi Railroad Company. Subsequent to this withdrawal by the Land Department, Congress, by the Act of July 2, 1864, granted to the Northern Pacific Railroad Company "every alternate section of public land . . . " upon filing of the railroad's map of





definite location. The Lake Superior and Mississippi Railroad Company filed its map of definite location in 1866 but the lands in dispute fell outside of their final grant. In 1882 the Northern Pacific Railroad Company filed its map of definite location which included the disputed lands. The Supreme Court held that withdrawn lands could not be included in the 1864 grant to the Northern Pacific Railroad. It reasoned that:

"At the time of the grant of 1864 to the Northern Pacific Railroad Company the lands here in dispute were . . . among those withdrawn by the Land Department from preemption, settlement, and sale . . . They were not, therefore, public lands embraced by the . . . grant [to the Northern Pacific Railroad] . . . The grant of the Northern Pacific Railroad Company spoke as of the date of the Act of July 2, 1864 . . . [As of] the date of the grant of July 2, 1864, [these lands] were not in the category of lands embraced by that grant of "public lands". When the withdrawal order ceased to be in force, the lands so withdrawn did not pass under the latter grant, but became a part of the public domain, subject to be disposed of under the general land laws, and not to be claimed under any railroad land grant. 204 U.S. at 196-97.

This decision in the Northern Lumber case, supra, is relevant to the case now under consideration by this Court. Section 6(b) of the Alaska Statehood Act permits Alaska to select only "public lands" which are vacant, unappropriated,





and unreserved at the time of their selection. According to Northern Lumber, the Supreme Court has held that withdrawn lands are not public lands. Thus, Alaska's selection of January 8, 1963, filed on withdrawn lands, would be without segregative effect. The lands in dispute were not "public lands" as required by law under Section 6(a) of the Statehood Act. When withdrawn lands were restored to the public domain, they were without any encumbrance. Alaska's selection of January 8, 1963 did not alter this in any way.

It is interesting to note that the segregation theory has had its greatest force in contests between claimants under homestead entries and a claimant under a railroad grant. That the segregation theory was to defeat a number of railroad claims was acknowledged by the United States Supreme Court in Northern Pacific Ry. Co. v. Amacker, 175 U.S.

66 (1899). The Supreme Court in that case stated:

There is no real hardship in enforcing this rule [the segregation theory] for if the individual seeking to maintain his homestead fails by reason of any defect he has no recourse on the government for the fees he has paid or for any compensation for the time and labor he has expended, while, on the other hand, the general provision of railroad land grants is to the effect that if the title to any tract within the place limits fails, the company may reimburse itself by a selection within the indemnity limits. It is not therefore strange that the rulings



of the land department, as well as of the courts, have been uniformly favorable to the individual contesting with a railroad company the right to a particular tract of land. 175 U.S. at 567.

In the case now under consideration, the Secretary of the Interior has attempted to place the State of Alaska in the position of the homesteader and the appellee herein in the position of a railroad company. This is completely contrary to the underlying policy of the segregation theory.

It should also be noted that the State of Alaska is precluded from selecting other land if the District Court's decision reversing the Secretary is affirmed. Under Section 6(b) of the Alaska Statehood Act, the State is permitted to select a total of 1,550,000 acres.

The Secretary of the Interior in his decision and appellants in their briefs, view the premature filing by the State of Alaska as a simple invalid filing which still operates to segregate the land in question.

However, since this filing was contrary to statute, it was not only invalid but void ab initio. This distinction was made in a number of early Land Department decisions. In Oregon and California R.R. Co. v. Jones, 22 L.D. 349, (1886), it was held that a donation claim to a tract of land, not included in the original donation claim, but





ed after the expiration of the Donation Law, was void  
ab initio and void on its face. The segregation theory  
is inapplicable to a filing void ab initio.

In Union Pacific Ry. Co. v. United States, 17 L.D.  
(1893), a case very much in point with the case now  
before this court, it was held that a Nebraska school in-  
terim selection made prior to statutory authority there-  
in was not just invalid, not just voidable, but absolutely  
void ab initio, and thus could not operate to segregate  
the lands. When Alaska filed its selection on the land  
now in dispute, the land was not subject by statutory  
authority to selection until the withdrawal order had been  
entered. Thus, the selection by Alaska on January 8, 1963  
was without the authority of law and absolutely void ab  
initio.

The Secretary of the Interior's decision in the case  
now under review admitted that, "the cited cases do not  
involve the segregative effect of an application or entry  
not properly allowed because the lands applied for were un-  
available (p. 11). However, the Secretary stated that the  
law was equally pertinent to unavailable land and cited  
his authority Keating et al v. Doll, 48 L.D. 199 (1921).

In Keating, supra, Doll settled on the land under a





special use permit and had made valuable improvements on the land while the land was still withdrawn as part of a national forest. At the time the land was released from withdrawal, Doll was in the penitentiary on a murder charge. Keating and Fox filed on the land. Upon Doll's release, he filed a supplemental application. Since neither Doll nor Keating had alleged settlement, and since Doll's privileges and immunities were not suspended while he was in the penitentiary, Doll's claim to the land was superior to that of Fox and Keating. Thus the case, properly, is of authority for the segregative effect of a filing on withdrawn land, but a decision on the effect of a valid supplemental application on prior invalid applications, since the only reason the supplemental application was not first in time was that the homesteader was in the state penitentiary. The Keating case was later cited for the proposition that a contest cannot be brought for reasons which are apparent in the records of the Department of Interior. Cymonds v. Cooper, 60 I.D. 358 (1949).

The holding in Keating et al v. Doll, supra, did not involve the segregation theory, even though such theory was mentioned in the case as part of the dictum. In addition, no effort was made in Keating et al v. Doll, supra, to exam-



previous Land Department and United States Supreme Court decisions involving the segregation theory. Finally, the decision in Keating states that Doll's entry was voidable, not void, and could be cured by filing supplemental application, which Doll had done.

A number of other Land Department and Interior Department decisions cited by the Secretary and appellants in their briefs deal with oil and gas leases. Since such leases are completely subject to the control of the Secretary of the Interior and their administration does not involve statutory interpretation or statutory requirements, these cases are not relevant to the facts of this case now under consideration by this Court. See Joyce A. Cabbott, 63 I.D. 22 (1956); Max L. Kreuger, Von B. Connelly, 65 I.D. 185 (1958).

The law as it has developed clearly precludes the application of the segregation theory to the facts of this case. The Secretary of the Interior recognized this with respect to previous Departmental decisions (p. 12-13). Without acknowledging the United States Supreme Court decisions cited above, he went to examine the so-called policy behind the departmental decisions and ruled that the administrative convenience and considerations of equity which shaped the





general rule are not present in the case now under consideration. Such a determination is not in accordance with the law, as pointed out above, and results in an arbitrary and capricious action.

Regarding administrative convenience, the Secretary stated that "the State is the only applicant whom the land office permits to file 'prematurely' " (p. 16), and thus the likelihood that the records will be cluttered with premature filing exists. There is nothing in the statute which permits this additional preference to the State of Alaska. Such a determination is completely arbitrary and capricious. In all matters other than the preference permit, individuals are on an equal footing with the State when it comes to withdrawn land.

The considerations of equity are disposed by the Secretary's statement that the early filing merely advanced the time to make its preference known and it was not inequitable to give the State a chance to take advantage of it. "No individual is harmed if the State is allowed to file somewhat sooner than general practice permits." (p. 16).

This concept of "so what if the State fudges a bit" is completely outside of the clear meaning of the Alaska





tehood Act. It is not "general practice" which gives the State of Alaska a preference period, but an express statutory provision. In addition, this general practice is in line with the holdings of the United States Supreme Court.

The decision of the Secretary in applying the segregation theory to the case at hand was in light of the express statutory language and the law as it has developed, clearly a decision not in accordance with the law. It was arbitrary and capricious and the District Court's decision reversing the Secretary should be affirmed.

#### IV

#### AMENDMENT THEORY OF THE SECRETARY OF THE INTERIOR IS WITHOUT FOUNDATION IN LAW.

In a last ditch effort to validate the void filing by the State of Alaska on January 8, 1963, the Secretary of the Interior viewed a number of amendments filed by the State of Alaska during and after the preference period as reaffirmations of the State's selection. He then held that these amendments could be treated as if the State had refiled its original application at the time of its amendments. For authority on this point, the Secretary cited two departmental decisions, Hunt v. State of Utah, supra; and Trott v. North-



Pacific Ry. Co., 45 L.D. 193 (1916), neither of which  
r applicable to the facts in this case or are convincing  
n their own merit.

None of the amendments filed by the State of Alaska  
described or covered the land involved in the case before  
this Court. The total effect of the amendment was to add  
ad to that which was selected in the void filing on Jan-  
ay 8, 1963.

The major case relied upon by the Secretary for this  
ulious attempt to validate a void filing is Hunt v. State  
of Utah, supra. In Hunt, the land under dispute had been  
subject to a powersite withdrawal when the State of Utah,  
n 1939, attempted to select lands under a grant of lands  
or Miners Hospitals. On December 17, 1940, the land was  
released from the powersite withdrawal and some two months  
ater in February, 1941, Hunt made application for a home  
nd business site. Subsequent to its 1939 selection and  
rior to release of the withdrawal order, the State of Utah  
iled a petition on June 27, 1940, under Section 7 of the  
ayor Grazing Act, for claissification of the lots as  
uitable for selection. The Commissioner of Public Lands,  
n May 16, 1941, reinstated the State of Utah's application  
nd rejected Hunt's application on the grounds that the





State's filing was first in point of time and that Hunt's possession of the land for business purposes was unlawful.

The decision in Hunt points out the confusion which exists in the Interior Department decisions regarding the application of the segregation theory. The decision states  
ht:

[T]he State's application for the lots was filed while they were in withdrawal and were not subject to appropriation. The State's application was, therefore, void and was properly rejected. Further, since no right was created by the application, none would be preserved by a reinstatement. Nor could any right be initiated thereby, for the status of the land on June 27, 1949, when the petition for reinstatement was filed, would be determining, and at that time the land was still under the spell of the withdrawal and therefore not subject to appropriation.

It is clear, therefore, that to reinstate the application on May 16, 1941, in the presence of the prior adverse claim of Hunt was to accord preferential treatment to the State, and in effect through the doctrine of relation to confer on the State's void application the status of an application legally capable of giving rise to a right inceptive as of the time of the original filing or of the restoration of the lands to disposition. This was clearly contrary to established precedents. . . . 59 I.D. at 46-47.

However, after stating this valid legal position, the decision goes on to treat the Commissioner's action in re-





stating the State of Utah's application as a ruling that, in this circumstance, filing of a new application was an unnecessary formality. Such reinstatement, however, was subject to the rights that Hunt might be deemed to have acquired by his prior application.

Hunt v. State of Utah, supra, can only be viewed as an attempt by the Secretary, as in the case now before this Court, to save a void selection for the benefit of a state government. He at least rejected the segregation theory in Hunt. However, there exists an important distinction between Hunt and the facts of the case now under consideration. In Hunt, the reinstatement covered the lands in controversy. Here the amendments filed by the State of Alaska did not.

The other case relied upon by the Secretary, Trott v. Northern Pacific Ry. Co., supra, based its holding which validated certain land selections on the segregation theory. Thus, its reasoning does not conform to the later case of Hunt v. State of Utah, supra. It is not apparent from the decision, but Trott appears to have validated just railroad's amendments. The Secretary said:

"The original selection could have been and was allowed as to tracts free from adverse claim, as above stated, irrespective of the



supplemental lists." (p. 196) (emphasis added)

These cases only display the confusion that exists within the decisions handed down in the Department of the Interior regarding land upon which a premature filing has been made.

To hold that the amendments filed by the State during the preference period are to validate the void filing of the State made on January 8, 1963 flies in the face of the statute. Sections 6(b) and 6(g) of the Alaska Statehood Act do not in any way permit such a construction. To view the statutory ninety day preference period as a mere formality is not statutory interpretation but statutory destruction. The specific language set forth for a preference period by the State of Alaska in Section 6(g) of the Alaska Statehood Act is not a mere formality. It sets forth a ninety day period and does not indicate that the State in any way can get around this by such means as the Secretary indicates.

Appellant Udall in his brief (p. 16) states that the amendment concept is analogous to that which establishes that an invalid will can be revived by duly executed codicil, and the will and codicil are regarded as one instrument speaking from the date of the codicil. This is a ridiculous analogy, for the law regarding wills and codicils





developed from the common law as a means by which the intent of a testator could be implemented. The factors to be considered when the intent of one man is being ascertained is quite distinct from a contest between parties under the public land laws. The public land laws have developed completely separate from any law regarding wills and estates. See Leach, Cases and Text on the Law of Wills, 59 (2nd Ed., 1960). Rules of interpretation with regard to wills have no application to statutory interpretation.

The amendment theory of the Secretary of the Interior is unreasonable and without foundation in law. The District Court properly held that it was contrary to the statute and should not be considered to validate the State's void selection.

## V

THE STATE OF ALASKA SELECTION IN THIS INSTANCE WAS A VIOLATION OF THE ALIENATION PROHIBITION OF SECTION 6(g) OF THE ALASKA STATEHOOD ACT.

The selection of lands in dispute was made on behalf of the City of Anchorage (p. 2, appellant, State of Alaska's brief). Not only did the City initiate the withdrawal proceedings, but it suggested that the land be placed under





al control. At no time did the State of Alaska, on its behalf, indicate an interest in the land in question, a desire to have it removed from the control of the federal government (see Exhibit "C" to State's appeal from the decision of the Director, Bureau of Land Management, July 1965).

Section 6(g) of the Alaska Statehood Act expressly prohibits the State from bargaining away its right of selection. It provides in part that:

"The authority to make selections shall not be alienated or bargained away by the State of Alaska."

The legislative history of the land grant provisions of the Statehood Act reinforces the alienation prohibition of Section 6(g). Congress was concerned (1) with the fact that over half of Alaska land was owned by the federal government; and (2) with the need for Alaska to have revenue producing land. Thus, Congress wished to insure that the State of Alaska acquired control of substantial land holdings, and that any monies received upon its sale or lease flowed into the State's coffers. See U.S. Code Congressional and Admin. News, 1965, pp. 2933-3007.

The Secretary was in error when he stated that the land selection here did "not mean that the State has sold or other



e disposed of its authority to make this selection or  
other." (p. 20).

Congress was not merely attempting to protect against  
right sale by the State of its authority to make selec-  
ns. The obvious purpose of the alienation prohibition  
vision was to preserve to the State, free from the ex-  
tion of pressures and influences of groups with interests  
olved other than those of the State as a whole, the power  
decision as to which lands should be selected.

## VI

THE SELECTION BY ALASKA OF THESE PARTICULAR LANDS WAS  
DISCRIMINATORY ACT IN FAVOR OF RESIDENTS OF ANCHORAGE TO  
DETRIMENT OF THE CITIZENS OF THE STATE AS A WHOLE.

The Alaska Statehood Act provided for a number of speci-  
c land grants to the State of Alaska in addition to the  
eral grant under Section 6(b). One such specific grant  
Section 6(a), which permits the State of Alaska to select  
400,000 acres of land for the purpose of furthering  
development and expansion of its communities.

Inasmuch as Sections 6(a) and 6(b) limit the number of  
rs that the State is entitled to, any selection under 6(b)  
r the benefit of one particular community will benefit





t community at the expense of Alaskan citizens as a  
le.

The Equal Protection Clause of the Fourteenth Amend-  
t to the United States Constitution requires like treat-  
t of persons similarly situated (16 Am.Jur.2d 849, Sec.  
). If a law, nondiscriminatory on its face, is applied  
a discriminatory manner, the application is unconstitu-  
onal. Discriminatory Law Enforcement and Equal Protection  
on The Law, 59 Yale L.J. 354 (1950); Champlin Refining Co.  
Cruse, 115 Colo. 329, 173 P.2d 213 (1946).

While Sections 6(a) and 6 (b) of the Alaska Statehood  
are nondiscriminatory on their face, the State's action  
using land from its acreage allotment under 6(b) for the  
exclusive benefit of the residents of the City of Anchorage  
conferred a benefit on a class not intended to be so  
refitted. Application of the statute in so discriminatory  
manner, in addition to being contrary to the intent of  
Congress, fails to satisfy the requirements of the Equal  
Protection Clause of the Fourteenth Amendment.





## CONCLUSION

The District Court's holding that the Secretary of Interior acted in an arbitrary and capricious manner, in accordance with law, when he refused to record appellees' several notices of occupancy or settlement, should be affirmed.

Under the scope of judicial review provided for administrative decisions in the Administrative Procedure Act, 5 U.S.C., Sec. 1009, an agency decision may be reversed and set aside if found to be not in accordance with law and arbitrary and capricious. C.F. Coleman v. United States, 381 F.2d 190 (1966).

Under the literal meaning of the Alaska Statehood Act, Sections 6(b) and 6(g), the application filed by the State on January 8, 1963 was void ab initio and a nullity. It could not segregate the land from subsequent appropriation. In addition, under the law segregation could not take place on withdrawn land.

The so-called amendments, or additional selections made by the State during the ninety day preference period, did not embrace the lands selected on January 8, 1963, and thus could not, under the literal construction of Section 6(g), be used to validate the previous void selection. The Secretary



y's reliance on this factor was not in accordance with

Following the ninety day preference period, the lands  
question became subject to the operation of the public  
laws generally, and the appellees' notice of location  
occupancy was subsequently duly tendered.

The Secretary's decision on January 20, 1966 was un-  
reasonable, not in accordance with law, in excess of stat-  
utory authority and limitations, and the District Court's  
order of October 31, 1966, reversing and setting aside the  
Secretary's decision and ordering the Land Office to take  
necessary action to accept appellees' claims should be  
affirmed.

DATED this 21st day of September, 1967.

HUGHES, THORSNESS & LOWE  
Attorneys for Appellees

By

  
MURPHY L. CLARK





CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and, in my opinion, the foregoing brief is in full compliance with those rules.

HUGHES, THORSNESS & LOWE  
Attorneys for Appellees

by MURPHY L. CLARK





IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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Nos. 21629, 21629A

STEWART L. UDALL, SECRETARY OF THE INTERIOR,  
AND THE STATE OF ALASKA,

Appellants

v.

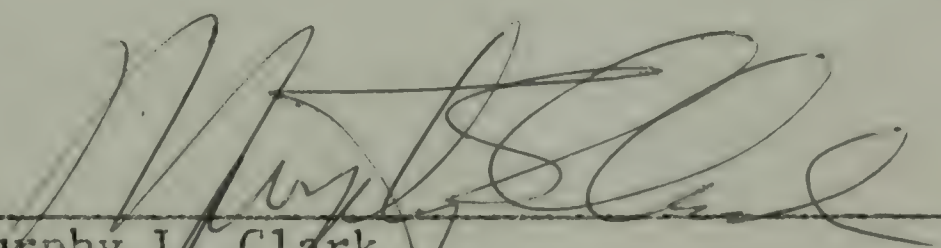
ANDREW J. KALERAK, ET AL.,

Appellees

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CERTIFICATE OF SERVICE

I certify that reproduced copies of the brief for the appellees were served on counsel for appellants by mailing, postage prepaid, three copies of same this 25th day of September, 1967, to: Richard L. McVeigh, Esquire, United States Attorney, Federal Building, Anchorage, Alaska 99501 and Honorable Edgar P. Boyko, Esquire, Attorney General State of Alaska, Pouch K, State Capitol, Juneau, Alaska 99801.



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No. 21,629

United States Court of Appeals  
For the Ninth Circuit

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STEWART L. UDALL, Secretary of the  
Interior, and STATE OF ALASKA,  
*Appellants,*

VS.

ANDREW J. KALERAK, et al.,  
*Appellees.*

On Appeal from the United States District Court,  
District of Alaska

REPLY BRIEF FOR APPELLANT  
STATE OF ALASKA

---

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No. 21,629

**United States Court of Appeals  
For the Ninth Circuit**

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STEWART L. UDALL, Secretary of the Interior, and STATE OF ALASKA, <i>Appellants,</i>	}
vs.	
ANDREW J. KALERAK, et al., <i>Appellees.</i>	}

**On Appeal from the United States District Court,  
District of Alaska**

**REPLY BRIEF FOR APPELLANT  
STATE OF ALASKA**

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**CONSIDERATION OF THE POLICY ADVANCED BY THE  
SEGREGATION DOCTRINE DEMANDS ITS APPLICATION TO  
THIS CASE.**

The salutary purpose of the segregation doctrine, which appellees seek to defeat, is to accord all persons an equal opportunity to apply for a portion of the public domain by establishing justifiable reliance upon the records of the land offices. In seeking to discredit the numerous cases dealing with widely varied fact situations which support the policy of the segregation doctrine, the appellees cite *Northern Pacific Ry. Co. v. DeLacey*, 174 U.S. 622, 43 L.Ed. 1111 (1898); and

*Oregon and California Ry. Co. v. United States*, 190 U.S. 186, 47 L.Ed. 1012 (1902). A review of both cases discloses that they are not in discord with either the policy of the segregation doctrine nor the application of the doctrine to this case.

In the *DeLacey* case, *supra*, one Flett filed a declaratory statement of intent to purchase certain lands in 1869. Applicable statutes required Flett to file further proofs and make payment for the land within 30 months. Flett, however, failed to do either and soon left the land. Some fourteen years later in 1884, with Flett's final proof approximately thirteen years past due, a railroad filed its map of definite location which encompassed the land in question.

The court stated that if Flett had made the required proofs and payment, that fact would have been a *matter of record* and stated:

"In such a case as this, where the forfeiture occurs by the expiration of the thirty months within which to make proof and payment, *the record shows* that the claim has expired; . . . [Emphasis added.] 174 U.S. at p. 633.

"When no proof and no payment have been made within the time provided by law, *the record will show that fact*, and that the right of the claimant has expired and the claim itself has ceased to exist." [Emphasis added.] 174 U.S. at p. 637.

The court held that where a simple reference to the record would disclose that a claim had expired, in this instance fourteen years previously, the claim would

not be afforded the same segregative effect as a claim subject to cancellation due to facts outside the record.

In *Oregon and California Ry. Co. v. United States*, *supra*, a notification was filed by one Hines on certain land under the Oregon Donation Act. That Act required that after filing the original notice, (1) further notice of the precise location be filed within three months, (2) proof of settlement and commencement of cultivation be filed within twelve months, and (3) proof of continual residence and cultivation be filed within four years. Fifteen years after Hines' initial filing, a railroad company claimed the land. A review of the record at the time of filing by the railroad indicated that no proof of settlement and cultivation had ever been filed by Hines. As a consequence the court concluded:

We think that, considering the fact that fourteen years had elapsed since the original settlement the railroad company would be authorized to infer that the donee had abandoned the land, as in fact appears to have been the case. 190 U.S. at p. 186.

Thus, in both *DeLacey, supra*, and *Oregon and California, supra*, it appears that the *record disclosed* sufficient facts, by way of total noncompliance with procedural steps for fourteen years and fifteen years respectively, to demonstrate that the land-seeking public could determine the availability of the land. Further, in *DeLacey*, the status of the original claim was of a type that the land office treated as having no segregative effect.



in rejecting the appellees' selections of land so heavily encumbered by the prior application of the State of Alaska which advanced the policy of the *Northern Lumber* case.

The remainder of appellees' argument against the segregation doctrine is wholly untenable. The suggestion that the segregation doctrine had its chief application in cases involving railroad grants is unsupported speculation. The argument advanced by appellees that the District Court should be affirmed because the State of Alaska can select other land, is hardly persuasive, since the appellees can also select other lands, lands which are not so entirely unsuitable for homesteading, while only the mountain watershed lands here in issue can provide the vital water supply sought to be protected by the State in the public interest.

Finally, the appellees repeat their erroneous argument that to afford segregative effect to the State of Alaska's application will be to give to the State an additional preference right to that granted by the Statehood Act. Whether the application of the State of Alaska, or any application, is afforded segregative effect has no bearing whatsoever on the final validity of that application. The reported cases make this fact clear.

The conclusion is inescapable that the Land Office records disclosed a viable, active application by the State of Alaska which was treated as valid in all respects by the Bureau of Land Management and that the lands encompassed were not available for filing.

If the State of Alaska's selection was invalid and if all members of the public are to be afforded an equal opportunity to obtain the lands in question, the State's application must be afforded segregative effect.

A contrary result would grant to the appellees a preference right over all other members of the public.

Finally, appellees' argument overlooks the basic purpose of, and the public policy underlying, the entire official transaction in this case, which they seek to frustrate by reliance on minor procedural technicalities. Upon the face of the entire record it must have been obvious to all concerned that what was attempted here was not the restoration of reserved land to public domain status, followed by routine selection for some purpose of a dignity no higher than appropriation by any other claimant of land. Rather what occurred here was an effort to transfer the public trusteeship of the vital watershed for Alaska's largest urban area from one sovereign to another, without disturbing the reserved character of the land. The acts of restoration and selection thus were mere procedural formalities and the egregious error committed by the Court below was to confound form and substance and thereby to defeat, unnecessarily, a vital public interest fully disclosed by the record to all who cared to see.



THE AMENDMENT THEORY OF THE SECRETARY OF THE INTERIOR WAS ENTIRELY REASONABLE SINCE IT MERELY RECOGNIZED THE NEEDLESSNESS OF RESUBMITTING A BRIEF LETTER AT A TIME WHEN THERE WERE NO INTERVENING RIGHTS TO BE CONSIDERED.

As has been demonstrated earlier (see Appendix, Brief of Appellant Secretary of the Interior), the original application of the State of Alaska was comprised of a single letter with an attached exhibit listing the lands selected. The amendments, filed during the statutory preference period and some two years prior to appellees' entries, were merely additional lists of land which were submitted with express reference to the original application letter. The Secretary of the Interior decided that the amendments filed during the State of Alaska's statutory preference period constituted a refileing of the original application. The Secretary of the Interior held, in effect, that it would have been a useless formality to require the State of Alaska to retype its letter of application. It would have been the merest pedantry to insist on repeating that which had already been done where no other claimants had intervened.

The original application and its amendments were all part of a single record when the appellees initiated their interest in part of the lands some two years later. They could not have been prejudiced in any way by the administrative method of handling of the State's application some two years before.



**THE STATE OF ALASKA MAINTAINED SOLE AND EXCLUSIVE  
CONTROL OVER ALL SELECTIONS OF LANDS UNDER THE  
STATEHOOD ACT.**

There is no evidence whatsoever for appellees' allegation that the State of Alaska alienated or bargained away its authority to select the lands here in issue. The selection was made by the State in its own name and was not subject to any contract, conveyance or other transaction with the City of Anchorage. Stated otherwise, if the State had not desired the lands in issue, it was in no way obligated to select them.

The lands in question were initially subject to Public Land Order No. 576, 14 F.R. 1614 for the protection of the water supply of the Anchorage area, the State's largest concentration of population and industry. The entire series of transactions which are before the Court in this appeal was designed and intended to continue the protection of this watershed. It is of no moment that the City of Anchorage, a political subdivision of the State, shared the interests and desires of the State of Alaska to protect the public watershed. It was the sole authority of the State of Alaska by which the selection was made and the appellees' brief contains only an entirely unsupported assertion to the contrary.

**THE SELECTION BY THE STATE OF ALASKA WAS A NECESSARY AND BENEFICIAL SELECTION FOR ALL ALASKANS.**

Appellees' assertion that the selection here in issue constituted a violation of Equal Protection is wholly unsupported by the facts and no applicable authority is cited therefor. There was no discrimination because selection of lands anywhere in Alaska is of benefit to all Alaskans.

The purpose of the land grants of the Alaska Statehood Act is to provide for Alaska's total economic and social development. Contrary to appellees' suggestion that all lands selected are to be sold or leased to provide revenue, it is reasonable to assume that some lands will be retained to protect mineral, wildlife and other natural resources. Some lands will be selected and retained in order to protect essential water resources, even though such lands may be completely unsuitable for production of any revenue whatsoever.

It borders on the frivolous to argue that Alaska discriminates against all non-Anchorage Alaskans by selecting some 30,000 acres of its 104,000,000 acre grant for the purpose of protecting the water supply of an area which contains more than one-half of Alaska's total population.

## CONCLUSION

The decision of the Secretary of the Interior, affirming the action of the Anchorage Land Office, is supported by the decisions of the federal courts which have considered similar cases and gives effect to the policies established by those courts. Moreover, the administrative procedures followed here were designed to carry out a public purpose superior to the acquisitive interests of appellees.

In order to effectuate those policies and purposes, the decision of the District Court should be reversed.

Dated, Juneau, Alaska,  
December 12, 1967.

Respectfully submitted,

EDGAR PAUL BOYKO

Attorney General

By DOUGLAS B. BAILY

Assistant Attorney General

*Attorneys for Appellant*

*State of Alaska*

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DOUGLAS B. BAILY,

*Attorney for Appellant*

*State of Alaska.*











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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STEWART L. UDALL, Secretary of  
the Interior, and the State of  
Alaska,

Appellant,

vs.

No. 21,629

ANDREW J. KALERAK, et al,

Appellee.

PETITION FOR REHEARING  
AND SUGGESTION OF APPROPRIATENESS OF REHEARING EN BANC

Appellees respectfully petition this Court for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure and pursuant to Rule 35 thereof respectfully suggest that such rehearing be by the Court en banc. This is no mere isolated dispute between A and B over the right to Blackacre, but affects the entire system of distribution of public lands. We submit that this Court's decision jeopardizes the administration of the public land laws generally by substituting elusive questions of intent for the straightforward procedural requirements of regulations promulgated by the Secretary. While the immediate result is to approve the Secretary's action in this case, the decision undermines the efficacy of his regulations and contravenes the settled principle of administrative law





that as long as they are in effect such regulations bind the Secretary as well as the public.

### ARGUMENT

This petition is addressed exclusively to the Court's holding that the Secretary properly treated Alaska's amendments of its original application for selection as a reapplication for selection of the lands described in the original application. The critical language of this Court's opinion is as follows:

"In our opinion the district court erred in failing to accept the second of these rulings. While Alaska's four amendments of the original application did not include the land descriptions set out in the original application, the state intended such amendments as a reassertion of the original land descriptions as well as applications for the selection of additional lands. This is indicated by the facts that: (1) the new lands were brought in by amendment of the original application (referring thereto by number), rather than by new applications, (2) the amendments referred to 'additional open lands,' indicating Alaska's view that it wished to select the lands described in the original application, and add thereto, and (3) the notice published after the four amendments had been filed, and before any of the plaintiffs tendered their claims for filing, named all lands described in the original application as well as the four amendments.

In view of Alaska's intent in this regard, and the lack of prejudice to plaintiffs inasmuch as they had notice of Alaska's claim to all such lands before they tendered their claims, the Secretary did not abuse his discretion in accepting the amendments as a timely reassertion of Alaska's original application." (Slip op. pp. 3-4).





This Court's view of the amendments attributes to Alaska the intent to select on five different occasions the land described in the January 8 filing. We submit that this interpretation is unsound.

The amendments did not constitute new selections of the land described in the invalid January 8 filing; they merely added new land thereto. This is clear from the language of the subsequent filings which do not even describe the land selected on January 8, but simply refer to the prior application in order to identify the prior document to which an amendment was being made.<sup>1/</sup> Our view is further confirmed by the notice published by Alaska and on which this Court placed special reliance. That notice, published after the 90-day period, at a time when under the statute and regulations the lands in question were again "subject to the operation of the public land laws generally"<sup>2/</sup> declared that pursuant to Section 6(b) of the Statehood Act, the State "on January 8, 1963, and subsequent amendments thereto, filed application Anchorage Serial 058566, for certain public lands \* \* \* more particularly described as follows. \* \* \*" The notice makes no claim that land was selected in the period between April 8 and July 8, 1966, and no person who read it could

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<sup>1/</sup> Since none of the lands involved in this litigation were the subject of the amendments, it need not be considered whether a selection within the open period which took the form of an amendment of a claim made in the withdrawal period would be valid.

<sup>2/</sup> Public Land Order 3022, 28 F.R. 3661, par. 5.



determine that the land had been selected in the open period even if the Secretary's relation-back theory were legally valid. For aught that appears in the notice all the amendments could have been just as premature as the original and invalid as the original selection of January 8 referred to therein.<sup>3/</sup> If intention is to be the test -- and we show below that it cannot be -- all objective evidence record dispels this Court's conclusion that it was intended by the amendments (and the reference therein to the earlier selection) to make a new selection of the lands originally invalidly claimed. But questions of interpretation aside, the amendments cannot be treated as a new selection, because the Secretary's own regulations forbid giving it such effect.

43 C.F.R. 1821.6-6 (formerly 43 C.F.R. 104.13)

provides as follows:

"Where entries, selections, or locations are improperly allowed, as where the lands are not subject to such entries, selections or locations, amendments will not be allowed, because such claims, being invalid, should be cancelled, and upon cancellation thereof a new entry, selection or location may be allowed as though the former had never been made." (Emphasis added).

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<sup>3/</sup> For the same reason, the notice could not vitiate the prejudice to appellants. It apprised them only that Alaska had made a claim, but during a period when the lands were not open for selection. Thus plaintiffs had every reason to believe that no valid prior selection had been made and that the land was for settlement when they tendered their claim.





The regulation thus makes crystal clear that an illegal entry cannot be revived and validated by amendment but must be cancelled, and upon cancellation a new entry may be allowed.

This regulation, like the others on which we rely, was promulgated pursuant to authority granted by statute and hence has the force of law. "That it binds him [the Secretary] as well as others while it is in effect is not doubted." Chapman v. Sheridan-Wyoming Coal Company, 338 U.S. 621, 629. The Sheridan-Wyoming Coal case thus anticipated -- and applied to regulations of the same character as are involved in this case -- what is now a firmly settled principle of administrative law: "that regulations validly prescribed by a government administrator are binding upon him as well as the citizen, and that this principle holds even when the administrative action under review is discretionary in nature." Service v. Dulles, 354 U.S. 363, 372, following Accardi v. Shaughnessy, 347 U.S. 260. See also Vitarelli v. Seaton, 359 U.S. 535; Williams v. Zuckert, 371 U.S. 531, 372 U.S. 765. That principle is wholly inconsistent with this Court's holding that the Secretary's action in this case in accepting the amendments as a timely reassertion of Alaska's original application can be sustained as an exercise of his "discretion." The Secretary had discretion to determine the effect which is to be given amendments to applications; and §6(g) of the Alaska Statehood Act expressly gave the Secretary discretion to formulate the procedures





by which Alaska would make selections thereunder. But having exercised his discretion to promulgate these rules, he is not free to waive them, although he is free to revise them by promulgating new ones.

This Court's decision did not rely on either the Alaska Statehood Act or the regulations promulgated thereunder to support the Secretary's decision. There is nothing in either which authorizes the Secretary to give effect to Alaska's "intent" and thereby to convert a right to select lands which are "unreserved at the time of selection" into a general power to select reserved lands and to validate such selection by subsequent amendment. Similarly, there is, of course, nothing in either the statute or the regulations which permits the procedures prescribed by regulation to be waived because of any intent of the claimant. Those regulations prescribe in considerable detail the procedures which must be followed for any selection of land under this Act; other regulations similarly prescribe the manner in which claims are to be made under other public land laws. Intent is irrelevant under all of them.

That long-standing practice has the soundest possible justification. It is essential to fair and efficient administration of the public land laws that the validity of claims be determined by clear and objective criteria. To give scope to the subjective factor of intent would continually invite disputes



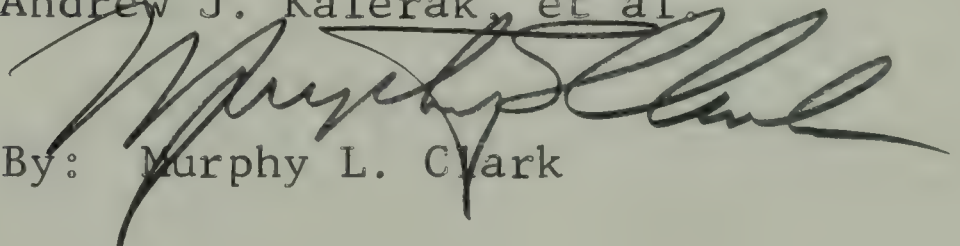
among claimants and would require costly hearings to resolve them. As with title registration, the key to successful and impartial administration is the adoption of clear procedural rules, with strict adherence thereto. Intent has no more place in determining the validity of a claim under the public land laws than in determining whether a deed has been properly recorded.

By introducing the factor of intent in this case, the Court has taken an unprecedented step which can only embarrass the administration of the public land laws. For that reason, and because the decision herein is inconsistent with the cited holdings of the Supreme Court, we urge that this petition for rehearing be granted.

Respectfully submitted,

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N O. 2 1 6 3 0 ✓

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT JAMES LINGO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

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JUN 7 1967





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N O. 2 1 6 3 0

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT JAMES LINGO,

Appellant,

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APPELLEE'S BRIEF

---

I

JURISDICTION AND STATEMENT OF THE CASE

The Federal Grand Jury for the Southern District of California returned Indictment No. 4303-ND on July 13, 1966, charging appellant with violating the Universal Military Training and Service Act, Title 50, App., Section 462, United States Code. On September 6, 1966, appellant pleaded not guilty. On December 6, 1966, he was found guilty by a jury in a trial before the Honorable Myron D. Crocker. On January 3, 1966, appellant was sentenced to the custody of the Attorney General for three years and thereafter he filed a timely notice of appeal.

The District Court had jurisdiction to try the case under





Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal under the provisions of Title 28, United States Code, Sections 1291 and 1294.

## II

### STATUTORY PROVISIONS INVOLVED

Title 50, Appendix, Section 462, United States Code, provides in part:

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than \$10,000, or by both. . . ."





Title 50, Appendix, Section 456(j), United States Code provides in part:

" . . . nothing contained in this title [section 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

### III

#### STATEMENT OF FACTS

On December 28, 1959, appellant registered at Local Board No. 63, located at 660 17th Street, Merced, California [Ex. 1, pages 1 and 2]. <sup>1/</sup>

On October 30, 1962, the Local Board mailed appellant a Classification Questionnaire which he completed and returned to the Board on November 2, 1962. In response to Series VII of the

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<sup>1/</sup> Ex. 1 refers to plaintiff's Exhibit 1.



Questionnaire pertaining to a minister or student preparing for the ministry, appellant stated: "I am a student preparing for the ministry pursuing a full-time course of instruction at the Kingdom Hall of Jehovah's Witnesses under the direction of Jehovah's Witnesses." Appellant also signed his name to Series VIII, thereby requesting the Local Board to furnish him a form for Conscientious Objectors [Ex. 1, pp. 4-9].

On November 2, 1962, the Local Board mailed appellant a Selective Service System Form 150, which is a special form for conscientious objectors [pp. 11-12]. On November 8, 1962, the Local Board received from appellant the completed Form 150. On page 1 of this form he indicated his opposition to participation in war either as a combatant or non-combatant. On page 2 of the form appellant explained how, when, and from what source, he received the training and acquired the belief which is the basis of his claim, as follows: "From childhood I was taken by my parents to the Kingdom Hall of Jehovah's Witnesses. There I learned the Bible principles that formed the basis for my belief." On page 3 of the form with respect to the official position of Jehovah's Witnesses concerning participation in war, appellant stated: "One's participation or non-participation in war is left for the individual member to decide." [Ex. 1, pp. 12-15].

On November 14, 1962, the Local Board mailed appellant a request that he appear for a personal interview with the Board on December 13, 1962, for the purpose of clarifying information in his Selective Service file [Ex. 1, p. 16]. On that date appellant





met with members of the Local Board and stated: "I am right now in training for the ministry." He also stated that this involved about four hours on week-ends participating in his church work, consisting of about one hour in a study group on Sunday night and the remainder in door-to-door preaching. Appellant stated that he had not been active in the Witnesses all of his life and that "I only became active about a year ago". He said that reason that he was not active was "I just was not interested". Appellant also stated that he objected to going to work in hospitals because he would be under Government control [Ex. 1, pp. 18-19]. Prior to conclusion of his interview with the Local Board appellant was asked questions designed to disclose his attitude toward the use of force. Thereafter, in response to the Board's question "Do you have anything that you would like to go on record here?". Appellant replied "No, I do not" [Ex. 1, p. 19].

On December 13, 1962, appellant was classified 1-A by the Local Board and was mailed notice of this classification on December 14, 1962 [Ex. 1, p. 8]. On December 19, 1962, the Local Board received a letter from appellant expressing his disagreement with the 1-A classification and requesting papers for an appeal [Ex. 1, p. 22]. Also on December 19, 1962, the Local Board forwarded the file of appellant to the Appeal Board [Ex. 1, pp. 11, 24].

On January 24, 1963, the Appeal Board tentatively determined that appellant should not be classified in Class 1-0 or in a lower class, and referred the matter to the Department of Justice





for the purpose of securing an advisory recommendation [Ex. 1, pp. 11, 25]. On November 4, 1963, the Department of Justice referred the matter to a hearing officer [Ex. 1, p. 31]. On February 25, 1964, the Department of Justice mailed the Appeal Board its recommendation based upon the conclusion of the hearing officer without a personal appearance by appellant [Ex. 1, pp. 33-39]. On March 2, 1964, the Appeal Board mailed appellant a copy of the Department of Justice recommendation and gave appellant 30 days within which to make any reply [Ex. 1, p. 40]. On March 23, 1964, the Board received a two-page written reply from appellant stating in part as follows: "I am aware that my reaching draftable age and becoming a student and adherent of the Bible took place at approximately the same time in my life. However, for you to conclude that the latter was an attempt to obviate the obligations of the former would be in error. Such was only coincidental and it is my wish that I had become more serious about religious matters earlier in my life." [Ex. 1, pp. 41-42].

In order to give appellant a personal appearance, his case was re-opened and on January 18, 1965, he appeared before the Hearing Officer [Ex. 1, p. 51]. Appellant informed the Hearing Officer that he was baptised a Jehovah's Witness on May 3, 1963. The Hearing Officer noted that appellant was inactive in congregational work prior to his 1-A classification by the Local Board and that he did not begin any intensive study of the Bible until about January 1963. Appellant told the Hearing Officer that it was a mere coincidence that his study of the Bible began after his 1-A



classification on December 13, 1962. The Hearing Officer found that appellant had shown no real interest in the teachings of the Bible until after he was classified 1-A and he found appellant to be insincere [Ex. 1, pp. 50-54].

On May 26, 1965, the Appeal Board sent a copy of the Department of Justice recommendation to appellant allowing him 30 days within which to reply [Ex. 1, p. 62]. On June 28, 1965, the Appeal Board received a two-page reply from appellant. In this reply appellant stated that he was a member of Jehovah's Witnesses, a group well recognized for its conscientious objection to military service. Appellant asked: "If I am recognized as an active member of this group why am I not looked upon as holding the same religious and conscientious beliefs as must all members before they are admitted to the group?" Appellant further stated, "The recommendation of the Department of Justice makes much of the fact that I first became active as a minister of Jehovah's Witnesses at about the same time military service appeared imminent. The implied slur is that I simply want to avoid military service for the easier or safer course of performing non-combatant work, such as some sort of clerical or hospital duties." Appellant further stated: "My claim should not be looked upon as being based on a 'sudden accession of belief' that happens to 'synchronize so perfectly with external facts' so as to be 'convenient'. Surely if, when reaching draftable age, one is considered mature enough to serve in the nation's armed forces, he also might have reached an age and point of emotional development where he could see the





need for serious religious study and participation. Hence, I vigorously repudiate the implication made by the Department of Justice!" [Ex. 1, pp. 63-64].

On September 16, 1965, the Appeal Board classified appellant 1-A [Ex. 1, pp. 11, 66]. On October 4, 1965, appellant was mailed notice of this classification [Ex. 1, p. 11]. On October 13, 1965, the Local Board received a letter from appellant indicating his desire to appeal the 1-A classification and requested that his case be presented to the President for consideration [Ex. 1, p. 67].

On December 8, 1965, the Director of Selective Service appealed to the President from appellant's 1-A classification [Ex. 1, p. 76]. On January 21, 1966, the President's Appeal Board unanimously classified appellant 1-A [Ex. 1, p. 80].

On February 18, 1966, the Local Board ordered appellant to report for induction on March 10, 1966 [Ex. 1, p. 82]. On March 10, 1966, he reported to the induction station and refused to be inducted into the armed services [Ex. 1, pp. 83-84]. Appellant gave a signed statement of his refusal [Ex. 1, p. 85]. On March 14, 1966, the Local Board received a letter from appellant in which he acknowledged his refusal to be inducted and his intention to persist in that refusal [Ex. 1, p. 97].





## IV

### ARGUMENT

#### There Was Basis In Fact For Defendant's Classification

A classification made by a Selective Service System Board is final and not subject to interference by the courts unless there is no basis in fact for the classification.

Witmer v. United States, 348 U.S. 375, 381 (1955);

Dickinson v. United States, 346 U.S. 389 (1953);

Cox v. United States, 332 U.S. 442, 448 (1947);

Estep v. United States, 327 U.S. 114, 122 (1946).

What constitutes "basis in fact" for the denial of a registrant's claim depends upon the nature of the claim. Where conscientious objection is alleged, insincerity constitutes a ground for denying a 1-O classification and a finding of insincerity can be based upon any fact which casts doubt on the veracity of the registrant.

Witmer v. United States, supra;

United States v. Corliss, 280 F.2d 808

(2nd Cir. 1960).

Appellant claims that his 1-A classification was made without any basis in fact. Since his ultimate classification was made by the President's Appeal Board, only that classification need be considered under the rule that subsequent classifications remove prior classifications from court consideration.



Storey v. United States, 370 F.2d 255

(9th Cir. 1966);

DeRemer v. United States, 340 F.2d 712, 719

(8th Cir. 1965);

Tomlinson v. United States, 215 F.2d 12

(9th Cir. 1954);

Skinner v. United States, 215 F.2d 767, 768

(9th Cir. 1954);

Reed v. United States, 205 F.2d 216, 218

(9th Cir. 1953);

Tyrrell v. United States, 200 F.2d 8, 11

(9th Cir. 1952), cert. denied

345 U.S. 910 (1953).

Although classifications made by the Local Board and Appeal Board are not at issue in this case, the proceedings before those boards are significant since they constitute the record upon which the President's Appeal Board acted. This record discloses several grounds for the ultimate denial of appellant's claim for classification as a conscientious objector, including the following:

The Local Board

In his Classification Questionnaire, appellant stated: "I am a student preparing for the ministry pursuing a full time course of instruction at the Kingdom Hall of Jehovah's Witnesses under the direction of Jehovah's Witnesses" (emphasis added).[Ex. 1, p. 7]. When the Board questioned appellant he admitted that his training involved about four hours on week-ends consisting of one





hour of group study and the rest of door-to-door preaching [Ex. 1, p. 18]. This clearly established that his claim to exemption as a full time ministerial student was not genuine. Such a baseless claim entitled the Board to view his other claims for exemption with suspicion and to doubt his sincerity.

Appellant's Conscientious Objector Questionnaire contains the statement, as to the source of the belief which is the basis of his claim, that: "From childhood I was taken by my Parents to the Kindom (sic) Hall of Jehovah's Witnesses. There I learned the bible (sic) principles that formed the basis for my belief." [Ex. 1, p. 13]. However, in December, 1962, appellant told the Board that he became active in the Witnesses about a year earlier and before that time he just was not interested [Ex. 1, p. 18]. Appellant's Conscientious Objector Questionnaire was filled out by someone other than himself but he failed to disclose this person's identity as required [Ex. 1, p. 15]. This inconsistency and omission were grounds upon which the Board could reasonably doubt his sincerity.

Further basis for disbelief of appellant's professed sincerity was furnished the Board by a letter received on December 13, 1962, from appellant's presiding minister which stated that appellant "devotes many hours each week to studying the Bible over which I personally supervise" [Ex. 1, p. 17]. However, on the same day appellant admitted to the Board that he spent only about one hour in study each week [Ex. 1, p. 18]. That appellant procured the sending of this letter appears from his subsequent letter to the





Appeal Board [Ex. 1, p. 63]. Appellant also told the Board that he objected to being under government control [Ex. 1, p. 18], thus raising the possibility that his objection to military service was motivated by other than conscientious opposition to war. White v. United States, 215 F.2d 782, 785 (9th Cir. 1954), cert. denied 348 U.S. 970 (1954).

In addition, the Local Board had the opportunity to judge appellant by his attitude and demeanor. This is a highly important factor as this Court pointed out in White, where it said:

"The local board initially, and the appeal board subsequently, were called upon to evaluate a mental attitude and a belief. It is plain that when such matters are to be determined and passed upon, the attitude and demeanor of the person in question is likely to give the best clue as to the degree of conscientiousness and sincerity of the registrant, and as to the extent and quality of his beliefs. The local board, before whom the registrant appeared, had an opportunity surpassing that available to us or to the appeal board itself to determine and judge as to these matters." (p. 784-785).

Appellant complains that the Local Board did not ask him anything about the sincerity of his conscientious objection to war and did ask him about his affiliation with Jehovah's Witnesses (Appellant's Opening Brief, pp. 6-7). Allegations of error by the



Local Board are not matters for consideration by this Court in view of appellant's subsequent classification. However, it should be pointed out that the Board questioned appellant about his participation in Jehovah's Witnesses activities in order to determine the facts about his claim to be a full time ministerial student. The Board also questioned him concerning his belief in the use of force, and gave him opportunity to make any further statement about his sincerity, which he chose not to do [Ex. 1, pp. 18-19]. Since appellant has the burden of establishing his eligibility for deferment to the satisfaction of the Board, he cannot complain of the Board's failure to ask questions. Tyrrell v. United States, 200 F.2d 8 (9th Cir. 1952), cert. denied 345 U.S. 910 (1953).

Appellant's complaint that the board should not have judged him as a member of a group but as an individual because members of Jehovah's Witnesses are free to serve in the armed forces or not as they choose (Appellant's Opening Brief, pp. 6-7) merely points up another instance in which appellant changes his story when it is convenient. In his Conscientious Objector Questionnaire, appellant said "One's participation or non-participation in war is left for the individual member to decide" [Ex. 1, p. 14]. Appellant later wrote the Appeal Board and asked: "If I am recognized as an active member of this group why am I not looked upon as holding the same religious and conscientious beliefs as must all members before they are admitted to the group?" [Ex. 1, p. 63]. It appears that when appellant was not active in his religious group he asked to be judged as an individual, and after he became active he asked to be





judged as a member of the group.

### The Appeal Board

After appellant appealed from his classification of 1-A by the Local Board, the Department of Justice made an inquiry into the matter [Ex. 1, p. 33]. The resume of this inquiry reflects that the congregational servant of Jehovah's Witnesses stated that appellant had performed five hours of "ministry work" in December, 1962, and eighteen hours in January, 1963, the month after he was classified 1-A [Ex. 1, p. 37].

In addition to the inquiry, appellant was given a hearing before a Hearing Officer [Ex. 1, p. 50]. At that time, he stated that he was baptized a Jehovah's Witness on May 3, 1963, and is opposed to military service and civilian work of national interest as well. The Hearing Officer noted that appellant was inactive in congregational work prior to his 1-A classification by the Local Board, and that appellant did not begin any intensive study of the Bible until about January, 1963. Appellant told the Hearing Officer that it was a mere coincidence that his study of the Bible began after his 1-A classification on December 13, 1962. The Hearing Officer found that although appellant had fair knowledge of the Bible at the time of the hearing on January 18, 1965, he had shown no real interest in its teachings until after he was classified 1-A. The Hearing Officer found appellant to be not sincere, either in his beliefs or in his intentions [Ex. 1, p. 52].

Appellant's claim that the Hearing Officer's statements and findings must be in error because they conflict with statements





made at appellant's meeting with the Local Board (Appellant's Opening Brief, p. 8) is ludicrous in view of the fact that it was appellant who made both statements. The explanation is not that the Hearing Officer erred, but that appellant told the Local Board one thing and the Hearing Officer another. This conclusion is bolstered by the fact that both the resume of the Department of Justice inquiry and the Hearing Officer's findings were sent to appellant for any reply he wished to make [Ex. 1, pp. 40, 62]. Appellant wrote lengthy replies, but never contested any of the matters of which he now complains [Ex. 1, pp. 41-42, 63-64]. In fact, appellant's replies claimed that his simultaneous draft eligibility and interest in Bible study "was only coincidental" [Ex. 1, p. 41], and stated that "the recommendation of the Department of Justice makes much of the fact that I first became active as a minister of Jehovah's Witnesses at about the same time military service appeared imminent" (emphasis added) [Ex. 1, p. 63].

#### The President's Appeal Board

Appellant seems to imply that the Selective Service Boards did not succeed in proving that he does not hold the belief claimed (Appellant's Opening Brief, p. 5). However, a conscientious objector claim admits of no exact proof, and no board could ever prove that a registrant does not have such a belief. The ultimate question is appellant's sincerity. The subjective determination of the President's Appeal Board on this question is amply supported by the objective evidence which casts doubt on appellant's veracity. This evidence includes the following:



- (1) The appellant's spurious claim for a ministerial student deferment;
- (2) his conflicting allegations as to the time his religious beliefs were formed;
- (3) the inconsistent statements regarding the extent of his involvement in church activity;
- (4) his objection to being under any governmental control;
- (5) the coincidence of his simultaneous interest in religious study and the imminence of induction, and
- (6) the evaluation of appellant's credibility and demeanor by the Local Board and the Hearing Officer, both of whom had the best opportunity to evaluate his claim, and both of whom found him to be insincere.

Founded upon the above mentioned items in the record the classification of the President's Appeal Board had more than ample basis in fact.

Appellant attempts to gloss over some of the inconsistencies in his statements by references to trial testimony (Appellant's Opening Brief, p. 9). This is improper, since evidence of "basis in fact" is limited to that which was before the board.

Cox v. United States, 332 U. S. 442 (1947);

Davis v. United States, 203 F. 2d 853

(8th Cir. 1953).





CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ David R. Nissen

DAVID R. NISSEN



IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DORMAN FRED TALBOT, JR.,

Petitioner and Appellant,

v.

LAWRENCE E. WILSON,

Respondent and Appellee.

No. 21631

APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DORMAN FRED TALBOT, JR.,

Petitioner and Appellant,

v.

LAWRENCE E. WILSON,

Respondent and Appellee.

No. 21631

APPELLEE'S BRIEF

JURISDICTION

Petitioner and appellant has invoked the jurisdiction of this Court under Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts

Appellant was convicted in the Superior Court of the State of California, County of Santa Barbara, of murder in the first degree (Cal. Pen. Code § 187). Pursuant to the verdict of the jury, a sentence of death was imposed. On June 3, 1966, the Supreme Court of California unanimously affirmed the judgment. People v.





Talbot, 64 Cal.2d 691, 414 P.2d 633, 51 Cal.Rptr. 417.

The United States Supreme Court denied certiorari to review the judgment on January 9, 1967. Talbot v. California, 87 S.Ct. 729.

On February 1, 1967, appellant filed with the Supreme Court of California a petition for a writ of habeas corpus. The petition was denied without opinion on February 8, 1967. In re Talbot on Habeas Corpus, Crim. No. 10803. Appellant sought a writ of certiorari in the United States Supreme Court to review the denial of habeas corpus. Certiorari was denied on June 12, 1967. Talbot v. California, 35 U.S.L. Week 3438.

B. Proceedings in the federal courts.

On February 14, 1967, appellant filed in the United States District Court, Northern District of California, a petition for writ of habeas corpus. Talbot v. Wilson, No. 45649 (N.D. Cal.). After oral argument, the Honorable Lloyd H. Burke, United States District Judge, issued an order denying said petition on February 23, 1967. On said date, appellant filed notice of appeal and Judge Burke issued a certificate of probable cause.

On February 24, 1967, this Court issued an order directing that proceedings on appellant's appeal be held in abeyance pending action by the United States



Supreme Court on appellant's petition for certiorari which, as noted, was denied on June 12, 1967.

#### STATEMENT OF THE FACTS

The facts are summarized in the opinion of the California Supreme Court, People v. Talbot, 64 Cal.2d 691, 414 P.2d 633, 51 Cal.Rptr. 417 (1966).

#### APPELLANT'S CONTENTIONS

Appellant has briefed the following contentions on appeal, while disclaiming any intention of waiving other claims raised in the petition below:

1. The jury was given no standards for its guidance in the exercise of its discretion to impose either death or life imprisonment.

2. The prosecutor suggested to the jury that its decision as to penalty should be based in part on an inflammatory photograph.

3. The Supreme Court of California failed to apply the harmless-error standard of Chapman v. California to appellant's claimed errors in regard to:

- a. illegal search and seizure;
- b. failure to give manslaughter instructions;
- c. prosecutorial comment upon appellant's failure to produce witnesses who would testify to his remorse.





## SUMMARY OF APPELLEE'S ARGUMENT

I. The absence of standards to guide the jury's decision as to choice of penalty raises no federal question.

II. The prosecutor's argument and the introduction of the photograph referred to therein did not work a denial of due process.

III. The California Supreme Court properly ruled that appellant's claims of error are without merit and properly applied the applicable nonfederal harmless-error rule.

## ARGUMENT

### I

#### THE ABSENCE OF STANDARDS TO GUIDE THE JURY'S DECISION AS TO CHOICE OF PENALTY RAISES NO FEDERAL QUESTION

Appellant correctly notes that, under California procedure, the choice of penalty to be imposed on one convicted of first-degree murder is left to the absolute discretion of the jury, and no standards are provided by statute for the jury's guidance. Cal. Pen. Code § 190.1. But appellant's contention that this procedure is unconstitutionally vague or otherwise denies due process is patently without merit, as Judge Burke properly held.

The same attack was levelled against a similar





statute of another state and flatly rejected in Petition of Ernst, 294 F.2d 556 (3d Cir. 1961). But appellant now urges that this discredited claim has been given new life by the recent case of Giaccio v. Pennsylvania, 382 U.S. 399 (1966), which held void for vagueness a state statute permitting a jury to tax costs to a defendant it has acquitted of a criminal charge. The holding thus has no relevance to a statute permitting a jury, without being bound by fixed guidelines, to determine the punishment to be suffered by one duly found guilty of first-degree murder. The Supreme Court expressly stated that:

"In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." Id. at 405 n.8.

This footnote was recently cited with approval in Spencer v. Texas, 87 S.Ct. 648, 652 (1967). We are willing to take the United States Supreme Court at its word. So were the two courts which have considered appellant's claim in the light of Giaccio. See Maxwell v. Bishop,



257 F.Supp. 710, 716-17 (E.D. Ark. 1966); People v. Seiterle, 65 A.C. 367, 374, 420 P.2d 217, 221, 54 Cal. Rptr. 745, 749 (1967).

A few pages from the history of the death penalty in California will bear out the observation of the court in Petition of Ernst, supra, 294 F.2d 556 (3d Cir. 1961), that vesting in the jury the discretion as to imposition of penalty, without fixed standards, is in all probability more helpful to the accused than would be the procedure of providing standards. Until the 1874 amendment of Cal. Pen. Code section 190, Amendments to the California Codes, 1873-74, p. 457, a conviction of first-degree murder automatically required imposition of the death penalty. From 1874 to 1956, the notion apparently persisted that the death penalty was presumptively proper in all cases of first-degree murder, and that the jury should impose a sentence of life imprisonment only if it should find evidence of extenuating or mitigating facts or circumstances. In holding erroneous an instruction to this effect in People v. Green, 47 Cal.2d 209, 302 P.2d 307 (1956), the California Supreme Court, relying in part upon decisions of the United States Supreme Court stating similar views, determined that, in order to afford maximum protection to the defendant, there should be no





presumptively correct penalty, and the jury should be free to impose either penalty without being restricted by externally-imposed standards. This procedure, which gives the jury free rein to exercise mercy, rather than adhere to the demands of strict justice, can only work to the benefit of one convicted of first-degree murder.

## II

### THE PROSECUTOR'S ARGUMENT AND THE INTRODUCTION OF THE PHOTOGRAPH REFERRED TO THEREIN DID NOT WORK A DENIAL OF DUE PROCESS

Appellant complains of the introduction of a photograph of the victim's body, which he claims to be inflammatory. The California Supreme Court met this claim by holding that the trial court acted within its discretion in determining whether the probative value of the photograph outweighed any possible prejudicial effect of its admission, and that the photograph was relevant and admissible to show the circumstances of the crime and facts in aggravation of the penalty. People v. Talbot, 64 Cal.2d 691, 706, 708, 414 P.2d 633, 643, 644, 51 Cal.Rptr. 417, 427, 428 (1966).

Petitioner has cited no case holding that introduction of allegedly inflammatory photographs in a state trial raises any federal question. But at his insistence, the photograph in question was obtained and





lodged with the Court below. Judge Burke examined it and disposed of appellant's contention in the following words, found on page 2 of his Order:

"Petitioner next claims that an allegedly inflammatory photograph of the victim's body denied him due process. In view of the state court finding that the probative value of the photograph outweighed the prejudice resulting from their introduction no federal question is presented. Chavez v. Dickson, 280 F.2d 727, 738 (1960). Furthermore, an independent review of the state record reveals that the photograph was relevant and that the probative value of the evidence warranted its reception into evidence."

The photograph in question, along with the complete trial transcripts, has been lodged with this Court. An examination of the photograph will disclose that, while by no means pretty, it was hardly inflammatory to the point of amounting to an arguable denial of due process. The numerous wounds apparent from the photograph could



be used to indicate a grim determination on the part of appellant to effect the death of his victim, and would thus render the photograph proper evidence in aggravation of the penalty. At the same time, the photograph could have been helpful to appellant. As appellant states, "The degree of frenzy evident by the wounds depicted in exhibit 21 may indicate the killer was not within his senses when he killed . . . ." (AOB 4). If so, the photograph was evidence of mental illness not amounting to legal insanity, and would thus tend to militate against the death penalty. Compare Anspacher, The Trial of Dr. de Kaplany (1965), recounting a famous murder trial wherein the jury imposed a life sentence on the basis of evidence of mental illness.

At all events, the issue of the photograph's admissibility has been thoroughly explored and determined adversely to appellant in previous state and federal proceedings. We submit that, on the basis of 28 U.S.C. § 2254(d), and traditional principles of appellate review, there is no basis for overturning the determinations of the California Supreme Court and the Court below.

Also without merit is appellant's contention that the prosecutor's argument, urging the jury to base its decision, in part, on the photograph in question, denied





due process. There was no objection to this argument at trial, and the trial court therefore had no opportunity to rule on its propriety. The Supreme Court of California properly ruled that the argument "falls within the purview of section 190.1 relative to the circumstances surrounding the crime and matters in aggravation of the penalty."

People v. Talbot, 64 Cal.2d 691, 711, 414 P.2d 633, 646, 51 Cal.Rptr. 417, 430 (1966). Appellant's contention that the argument affected the "impartiality" of the jury (AOB 5) is not well taken. A jury's "impartiality" or the lack thereof depends upon its preexisting attitudes and opinions, and those developed as a result of matters brought to the jury's attention otherwise than through the presentation of evidence, the argument of counsel, and the remarks of the court. It relates to the jury's ability to weigh fairly, based upon its preexisting attitudes, the evidence and arguments presented to it, and is, by its very nature, not affected by the evidence and arguments themselves.

### III

THE CALIFORNIA SUPREME COURT PROPERLY  
RULED THAT APPELLANT'S CLAIMS OF ERROR  
ARE WITHOUT MERIT AND PROPERLY APPLIED  
THE APPLICABLE NONFEDERAL HARMLESS-ERROR  
RULE

---

Appellant contends that the California Supreme Court found three errors in his trial but affirmed despite them,





applying the state standard of harmless error, rather than that subsequently laid down by the United States Supreme Court in Chapman v. California, 87 S.Ct. 824 (1967). But there was clearly no error found by the California Supreme Court and, in any event, application of the state rather than federal standard of harmless error was proper.

Appellant claims that the California Supreme Court held that the admission of certain evidence, which appellant claims was the product of an illegal search and seizure, was harmless error. This is not correct. The record showed that a police officer had examined appellant's Chevrolet automobile and observed blood stains on the trunk. On the basis thereof, the vehicle was impounded, its trunk having first been sealed, and held for later scientific examination. This examination disclosed certain evidence in the trunk which was admitted at trial. The California Supreme Court, acting on the assumption that a warrantless search had been made, determined the search to be legal, and that appellant had waived any objection thereto, and observed that, in any event, appellant had not shown prejudice from its admission. People v. Talbot, 64 Cal.2d 691, 708-09, 414 P.2d 633, 644-45, 51 Cal.Rptr. 417, 428-29 (1966). The determination that the search was proper was subsequently vindicated by the



United States Supreme Court in Cooper v. California, 87 S.Ct. 788 (1967), which held that a properly-impounded vehicle may, even in the absence of a warrant, be searched for evidence of any offense related to the reason for its being impounded. Because of the bloodstains found on the exterior of the vehicle in the instant case, there can be no doubt that it was properly impounded.

As noted above, the California Supreme Court apparently assumed that the search of the Chevrolet was made without a warrant, since the record failed to indicate that a warrant had been obtained. This is explainable by the fact that there was no objection to the search and seizure, and consequently no necessity for the prosecution to produce warrants. But there actually were warrants. Attached herewith, marked "Exhibit A" through "Exhibit F," and incorporated herein by reference, are certified copies of warrants, together with supporting affidavits, returns, and inventories, which authorized searches of appellant's Chevrolet and a 1960 Rambler also owned by him for the items of physical evidence the admission of which he now assigns as error. This Court may take judicial notice of these documents. See Jones v. Attorney General, 278 F.2d 699, 701 (8th Cir. 1960). These items are listed in the Talbot opinion, 64 Cal.2d at 708-09,





414 P.2d at 645, 51 Cal.Rptr. at 429.

These warrants not only show that the search was unquestionably valid, but demonstrate why there was no issue of illegal search and seizure raised at trial. Thus, any question of a misapplication of the harmless error rule is irrelevant. Also irrelevant is any question of whether, by failing to object to the admission of the evidence, appellant deliberately forewent the privilege of seeking to vindicate his search and seizure claims in the state courts, within the meaning of Henry v. Mississippi, 379 U.S. 443 (1965). That question arises only when a state court applies its contemporaneous-objection rule as a ground for failure to consider the claims. Here, the California Supreme Court, despite the absence of an objection, not only considered the claim but properly held it to be without merit.

Appellant next contends that the California Supreme Court applied an impermissible standard in holding the failure to give his requested instructions on manslaughter to be harmless error. In the first place, the California Supreme Court did not hold the failure to be error, but refused to consider the argument on the ground failure to give the instructions could not have prejudiced appellant. People v. Talbot, 64 Cal.2d 691, 711, 414 P.2d 633, 646, 51 Cal.Rptr. 417, 430 (1966). In the second place,





the claimed error was purely one of state law. See Poulson v. Turner, 359 F.2d 588 (10th Cir. 1966), which held that an error in failing to instruct on a lesser degree of murder does not raise any federal question. As stated in Chapman, "The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law." 87 S.Ct. at 826.

Further, there was no error under state law. The gist of appellant's claim is that he had presented evidence of diminished mental capacity to harbor malice, the mental state necessary to commit murder. It was held reversible error to refuse instructions that such evidence, if believed, would entitle an accused to a verdict of manslaughter, in People v. Conley, 64 Cal.2d 310, 411 P.2d 911, 49 Cal.Rptr. 815 (1966). It has never been held, however, that such instructions must be given sua sponte. In the instant case, all of the manslaughter instructions refused are set out at pages 21 through 25 of the Clerk's Transcript. It will be noted that they all relate to voluntary manslaughter, which under California law is the unlawful killing of a human being without malice, committed upon a sudden quarrel or heat of passion. Cal. Pen. Code § 192. There was absolutely no evidence in the instant



case showing or tending to show that the crime could constitute voluntary manslaughter under this definition. The type of manslaughter of which appellant claims he produced evidence is one not even recognized by statute, but only by judicial decisions, such as Conley. Assuming, arguendo, that it might have been appropriate to give instructions of the kind approved in Conley, to the effect that petitioner's mental state might have been such as to prevent him from harboring malice, no such instructions were requested. Therefore, petitioner cannot claim error in failure to give them.

Appellant's last contention is that the prosecutor commented upon his failure to produce witnesses who would testify to his remorse, that this comment violated Griffin v. California, 380 U.S. 609 (1965), and that the California Supreme Court held this comment to be harmless error, without applying the Chapman rule. In the first place, the California Supreme Court held this not to be error at all, much less harmless error. In the second place, appellant's assertion that the comment violated Griffin was properly answered by the California Supreme Court:

"Defendant complains that the remark constituted a comment on his failure to testify, in that the





witnesses whom he was supposed to call would testify to what he told them. The remarks were, however, in terms of how defendant appeared and acted and were remote from an intimation that defendant himself should have testified." People v. Talbot, 64 Cal. 2d 691, 712, 414 P.2d 623, 647, 51 Cal.Rptr. 417, 431 (1966).

Indeed, we are unable to see how comment on an accused's failure to produce evidence of self-serving hearsay statements made to others can be considered to impinge upon his privilege against self-incrimination, within the meaning of Griffin. The "letter and spirit" of Griffin is that comment upon an accused's failure to testify has the effect of inducing him to take the stand and thereby waive his privilege against self-incrimination. The comment in the instant case could not conceivably have such an effect.

Appellant has indicated that he will rely on the arguments presented in his Points and Authorities in support of the petition below as his argument in support of contentions raised below but not briefed in this Court. Out of fairness, appellee will similarly rely on his Points and Authorities in support of the return





below as his answer to these contentions.

CONCLUSION

There being no merit in appellant's contentions,  
we respectfully request that the order denying the writ  
be affirmed.

DATED: July 11, 1967.

THOMAS C. LYNCH, Attorney General  
of the State of California

EDWARD P. O'BRIEN  
Deputy Attorney General

*George R. Nock*

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Attorneys for Respondent-Appellee



CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

DATED: July 11, 1967.

George R. Nock  
GEORGE R. NOCK  
Deputy Attorney General





EXHIBITS





No. 21633

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT E. GOLLAHER, etc.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee

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APPELLANTS' OPENING BRIEF

FILED

JAN 9 1968

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UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT E. GOLLAHER, etc.,

Appellants

vs.

U. S. A.,

Appellee

APPELLANTS' OPENING BRIEF

---

JURISDICTION

The jurisdiction of the District Court is founded on 18 U.S.C. 1001, 18 U.S.C. 1010 and 18 U.S.C. 371. The jurisdiction of this court is founded on 28 U.S.C. 1291. Judgment was entered December 12, 1966. R. 244. Notice of appeal was filed December 21, 1966. R. 246.

PROCEDURAL STATEMENT

In an indictment filed March 17, 1966, in the then U.S. District Court for the Southern District of California, Northern Division (Fresno), Robert E. Gollaher and Gollaher Construction, Inc., a corporation, appellants, (hereafter referred to as appellants) and Evelyn E. Barbee,





(hereafter referred to as Mrs. Barbee) were indicted in 15 counts on the following charges: conspiracy to make false statements to a government agency and to make false statements in FHA transactions -- violation of 18 U.S.C. 371; actual making of false statements to government agencies, the VA-violation of 18 U.S.C. 1001; and actual making of false statements in FHA transactions -- violation of 18 U.S.C. 1010. R. 1-20.

On April 4, 1966, Mrs. Barbee pleaded not guilty and leave was granted to appellants to file pretrial motions. R. 22. Motions were filed on May 2, 1966 by appellants to dismiss the indictment, for a bill of particulars, for discovery and inspection or in the alternative for continuance. R. 23-46.

Motion to dismiss the indictment was based on the following grounds:

1. Sufficient facts were not stated to constitute an offense against the United States. R. 23.

2. The indictment was a nullity because it was based in part on testimony of Robert E. Gollaher (hereafter referred to as Appellant Gollaher) who was called to testify before the grand jury investigating appellants, in violation of appellants' rights to counsel and against self-incrimination.

3. The indictment violated appellants' consti-





tutional rights under the 5th Amendment against double jeopardy and double punishment and under the 8th Amendment against cruel and unusual punishment in that appellants had already been punished for the same acts by reason of suspension from eligibility for home loan guarantees by the VA and the FHA.

4. The indictment violated appellants' constitutional rights under the Due Process Clause of the 5th Amendment to equal protection of the laws in that appellants were unfairly singled out for prosecution.  
R. 24.

The government filed a bill of particulars and opposition to motion of appellants for a bill of particulars and opposition to the motion to dismiss.  
R. 46, R. 55, R. 80.

On May 23, 1966, the various motions were argued before Judge M. D. Crocker and were submitted.  
R. 88. On May 27, 1966, the court denied the motions, and the case was set for trial on October 18, 1966.  
R. 89-96.

Motions were filed for leave to file Petition for Writ of Mandate in the Court of Appeals, but the motions were denied.

Mrs. Barbee, on October 13, 1966, withdrew



her former plea of not guilty and pleaded guilty to Count 2 of the indictment. Sentencing was ordered to be reset after appellants' trial concluded. R. 100.

On October 18, 1966, appellants pleaded not guilty to each of the counts. A jury was impanelled and presentation of evidence began. R. 101. Trial continued October 19, 20, 21, 26, 27, 28, 31 and November 1, 2, 3 and 4.

On October 31, 1966, a motion for judgment of acquittal as to the entire indictment was made by appellants pursuant to Rule 29 of the Federal Rules of Criminal Procedure. R. 108. The motion was denied. After both sides had rested and rebuttal testimony had been introduced, appellants again moved for judgment of acquittal. After argument, the motion was denied. R. 111.

The case was argued on November 4, 1966, the jury was instructed, and deliberations began at 3:30 p.m. At approximately midnight, the jury brought in verdicts of guilty against both appellants on Counts 1 through 6, and no verdicts on the remaining counts. R. 112-113.

Motions for judgment of acquittal notwithstanding the verdict and in the alternative for a new trial were made. R. 218-224; 234-241. The motions were denied. R. 242.





On December 12, 1966, Appellant Gollaher was sentenced to two years imprisonment on Counts 1 through 6 to run concurrently and was ordered to pay a fine of \$5,000 each on Counts 1 through 6. One year of the sentence was suspended if the fine were paid in a year. Appellant corporation was ordered to pay a fine of \$1,000 each on Counts 1 through 6. R 244.

Notice of appeal was filed December 21, 1966.  
R. 246.

#### FACTUAL STATEMENT OF THE CASE

##### A. The Prosecution Case

A narrative of the evidence from the view of the prosecution is as follows:

Appellants and Mrs. Barbee, along with unindicted co-conspirators, were charged with a conspiracy to make false statements to the federal government and its agencies in connection with home loan guarantees. (Ct. 1) Appellant Gollaher was president of appellant Gollaher Construction, Inc. (hereafter referred to as Appellant Corporation), a construction company building tract homes in the Fresno area. Several unindicted co-conspirators were the various homebuyers.

The alleged overt acts of the conspiracy paralleled





the substantive counts of the indictment. Count 2 charged that on or about June 18, 1962, appellants approached Lloyd V. McDaniel, brother-in-law of appellant Gollaher, and asked him to apply for an FHA loan for a home at 5144 East Lamona, Fresno, California. The deposit receipt (Ex. 8A3) used in connection with the McDaniel transaction stated that a \$400.00 deposit had been made on the purchase price. McDaniel testified that he did not make the \$400.00 down payment, but that appellant Gollaher furnished the money for it. Tr. 704:12-15; 18-19). McDaniel said he, as an office clerk and bookkeeper for appellants, made out a check for \$803.49 and deposited it in his account, and he wrote a check for that amount, cashed it and took it to the title company for use in the escrow to purchase the home. Tr. 704:21-24.)

McDaniel testified that in July 1962 he had a conversation with appellant Gollaher regarding the home, after the FHA application had been made and Gollaher told him: "You kids don't want that house. Art Nichols (a salesman) has it resold." T. 706:10-19.

McDaniel figured in another home sale. He testified that appellant Gollaher asked him whether appellants could use McDaniel's VA home loan guarantee entitlement. He said Gollaher told him that Gollaher would assume full responsibility and would pay McDaniel \$300.00 for use of



his VA entitlement. Tr. 707:12-16. This second home was located at 4226 North Pleasant Avenue, Fresno. Tr. 707: 24-708:1. McDaniel acknowledged that he signed VA form 26-1802 in which he stated that he intended to live in the house and that he had made a \$25.00 deposit. Tr. 708:15-709:3. Ex.2D. McDaniel, when asked if he intended to occupy the house, answered: "No, sir, not when I first signed the papers, I didn't." Tr. 708:22-24.

He also testified that he did not make the \$25.00 deposit as recited in form 26-1802 (Ex. 2D) and in the deposit receipt. Ex. 2E.

He testified that he never did reside in the house and never received the \$300.00. T. 710:16-20. He further testified that the Government held him responsible for a deficiency in payments. He testified that it was "quite a shock" to him and that he borrowed \$1070.00 from his credit union to pay the government. Tr. 711:20 to 712:25.

McDaniel figured in another count of the indictment. He was the tenant of Richard Holt, an unindicted co-conspirator, involved in Counts 1 and 3. Tr. 461-462. Holt testified that in Spring 1962, appellant Gollaher talked to him, at a time when no one else was present, about his VA loan entitlement. The discussions were held over a period





of several weeks. Tr. 455:4-19. Gollaher asked to use Holt's VA entitlement to put another party in a house. Gollaher told Holt that it was commonly done and that he would pay Holt \$300.00 for use of his VA rights. Tr. 456:1-19. At the time (Spring of 1962) Gollaher owed Holt Lumber Co., operated by Richard Holt and his family, for materials. Tr. 456:20-22. Holt testified that Gollaher told him to say that the \$300.00 was for materials purchased from Holt. Tr. 457:4-7.

Holt signed an application for a VA loan guarantee, (Ex 1B) but never intended to occupy it. Tr. 458:19-21. He also signed a deposit receipt indicating he had made a \$25.00 down payment, but he never made that payment. Tr. 459:1-11. Ex. 1C. Holt received \$300.00, but he did not know from whom he received it. Tr. 459:12 to 460:7. The money was deposited in Holt's personal checking account, (Tr. 464:3-10) in October of 1962. Tr. 480:1. Holt said he originally believed he had placed the \$300.00 check, made payable to his firm in the firm account, but later discovered he had endorsed the firm name on the check and put the money in his personal account. Tr. 480:17-481:1. Holt's wife testified that she never intended to move into the VA guaranteed home at 5155 East Lamona, but did not indicate whether appellants were aware of her intentions. Tr. 482:24 to 483:1.





On cross-examination, Holt testified that Gollaher had purchased \$60,000 or more of lumber during the year in hundreds of transactions and that Gollaher always received a cash discount for prompt payment. Tr. 543:16-24. He admitted, however, that before the grand jury, he testified that Gollaher was as much as 90 days behind in payments and Holt was concerned about the account. Tr. 546:23 to 548:5.

Holt further admitted, when confronted with an invoice for \$300.00, that a set of his firm's invoices had been tampered with so that the original (white copy) indicated a credit to a customer dated March 12, 1962 (Ex.K) while a carbon was dated September 5, 1962 and indicated a billing for \$300.00 made out to Gollaher Construction Co. Tr. 552-556. Holt further admitted that he had told the grand jury that he had never submitted an invoice to appellants for \$300.00. Tr. 556:17-21. Holt said he did not remember the circumstances of submitting the invoice and receiving the \$300.00 check. T. 557:11-22; 561-562:11. Holt revealed that the value of the home he had purchased had increased in value. Tr. 563:11-21.

Mrs. Barbee, secretary-receptionist for appellants and a co-defendant, testified that she processed the Holt loan on orders of Charles Barboza, who called



her and said Holt would come over to complete a loan application on a home, and the company would find a buyer to take over the loan. Tr. 208:23-209:2; 210:3-211:23.

She said she did not remember discussing the Holt loan with appellant Gollaher. Tr. 225:17-4. The deposit receipt on the Holt loan (Ex.1C) bore Appellant Gollaher's name signed by Mrs. Barbee. The VA returned it and asked for Gollaher's signature, which he affixed to the document at the office of the lender. Tr. 224:13-22.

Mrs. Barbee said she made out the deposit receipt (Ex. 8A-3) and loan application on the McDaniel FHA home purchase and signed appellant Gollaher's name to the receipt, which indicated a \$400.00 down payment. Tr. 237:22-238:5. She testified that the McDaniel loan was discussed at a sales meeting at which she, appellant Gollaher, Charles Barboza, Art Nichols, a salesman, and Robert Maus, real estate broker, were present in June of 1962. Mr. Nichols had sold a house to a Mr. Filanowski, who was unable to qualify for a loan, and appellant Gollaher and Mr. Barboza suggested that McDaniel's loan be placed on the property to be used for Mr. Filanowski. Tr. 251:1-20.

The McDaniel VA application was processed by Mrs. Barbee also. Tr. 227:10-22. That was in connection





with a proposed sale to a Mr. DeMatteo, who could not qualify for a loan. She said that the transaction was discussed at a sales meeting in July of 1962. Present were Mr. Barboza, Gollaher, Art Nichols and Mr. Maus. Tr. 252:13-22. Gollaher said to process McDaniel's VA eligibility for Mr. DeMatteo. Tr. 254:12-14.

As to the transactions that make up the remaining counts of the indictment on which the jury returned no verdict, but which may form part of the overt acts of the conspiracy count, Mrs. Barbee testified that she processed and in fact initiated them.

In connection with the home mentioned in Counts 7 and 8, a Mr. and Mrs. Showalter had purchased it, but could not qualify for a loan. Appellant Gollaher and Barboza suggested at a sales meeting in July or August of 1962 that Mrs. Showalter be contacted to see if some member of her family could qualify on her behalf. Tr. 258:1-12. Mrs. Showalter testified that in April or May of 1962 she talked to Mrs. Barbee, who asked whether Mrs. Showalter knew of any veterans who have VA loan entitlements to let her use. Tr. 575:15-18. She gave the names of her brother, Melvin Bricker and of Marquis Pool. Mr. Bricker discussed the sale of rights with Mrs. Showalter and Mrs. Barbee. Tr. 575:19-23.





The latter told him he would get \$300.00 and that everything was legal for use of his entitlement. Tr. 587:19-23. Mrs. Barbee was instrumental in processing the Vargas loan application (Count 11) knowing the Vargases would not occupy the property. Tr. 394:4-8; Tr. 778:2-18. One of the participants in this transaction was George Knapton a real estate broker, who sold homes at the tract, (Tr. 394:16-21) and in fact the record shows that the transfer of the property in Count 11 (1267 North Bailey Street, Fresno) was from George Knapton to the Vargases and that appellants were not involved. Ex. 5B.

Counts 12 through 15 dealt with a Robert and Carmen Porras. Once again Mrs. Barbee dealt with the veteran. T. 395:9-18 and T. 617:3-5. Mrs. Barbee told Porras he could get \$300.00 for the use of his VA loan entitlement. T. 617:12-22. Count 12 deals with false statement on the VA application, (Ex. 6B) in connection with a house at 4258 North Woodson Avenue, Fresno, while Count 13 deals with a false statement of \$25.00 deposit (Ex. 6C). The application for this particular home was rejected. Tr. 620:18-21. Thereafter Porras applied for a home loan at 4224 North Kavanaugh, and purportedly made false statements in the loan application, Ex. 7D. The indictment alleges offenses connected with a sale at



4224 North Woodson Ave. T. 19, 20 and therefore the evidence did not support the allegations of the indictment.

Charles Barboza, who was general manager for appellants, testified that his salary was \$225.00 a week and that he was to receive a \$100.00 bonus for each house he sold. Tr. 650:11-12. He said he discussed the Holt transaction with appellant Gollaher,( Tr. 652:5-19) between May and July of 1962. He testified that Gollaher told him to apply for a loan on a house in the name of Holt, and McDaniel, the brother-in-law, would live in it. Tr. 652:22 to 653:2. Barboza identified Ex. K, a check for \$300.00 to Holt Lumber Co., as payment for the purchase of Holt's entitlement. T. 653:13-23. Barboza further testified that purchases of veterans' entitlements were discussed at sales meetings in detail. Tr. 665:19 to 666:12. When pressed for specifics of any fraudulent transaction, Barboza was unable to comply. See e.g., Tr. 678:6, 15-16, 21; 679:9-15, 22-24; 680:1-11, 17-22; 681:2-23, 682:1-3.

Mrs. Barbee testified that she had authority to sign Appellant Gollaher's name to various documents used in loan processing. (Susan Roberts of T. J. Bettes Company, a lender, testified that the practice with home-builders was to have all documents necessary to complete a loan application signed in blank, and the lender would





fill in the blanks with information supplied. Tr. 143:19 to 144:14; 145:4-6.)

George Howarth of the legal division of the VA, San Francisco, loan guarantee division, testified that the VA in guaranteeing a home loan relies on the statement in the form 1802 of intention to move into a house. (Tr. 22:11-23:2) and on the deposit receipt. Tr. 27:5-14.

On cross-examination, he stated that a \$25.00 down payment on a transaction would not influence the VA to accept or reject an applicant. Tr. 62:18 to 63:15. He further stated that a down payment was not required by the VA. Tr. 63:16-18.

#### B. The Defense Case

Appellants contended that since they had been suspended by the VA and FHA for the same alleged acts charged in the indictment and for that reason were unable to continue in the homebuilding business, they had already been punished for the same acts. A subsequent criminal trial constituted double punishment, and double jeopardy and cruel and unusual punishment. This argument was raised in the Motion to Dismiss the Indictment. At trial, the court would not permit introduction of evidence regarding the suspension and the denial of a





of a civil or administrative hearing to appellants. Tr. 960:3 to 961:22. An offer of proof was made. Tr. 967:24 to 969:19.

Further contentions were that neither appellant Gollaher nor the appellant corporation participated in any of the crimes alleged in the indictment. Appellant Gollaher was building tracts in other places other than the tracts involved in the home sales charged in the indictment. He was an officer of the San Joaquin Valley Homebuilders Assn., was active in the state Homebuilders Assn., and was a member of a state committee drafting a building code. Tr. 997:14 to 1000:6. All of this activity took him away from his office in Fresno for long periods of time and he left the day-to-day operations up to his staff, mainly Mrs. Barbee and Mr. Barboza.

The sales office where Mrs. Barbee worked was at the tract, while Gollaher's main office where he had his headquarters, was in another part of the city. Tr. 992:9-12 and 996:4-25.

All documents and checks were presigned because he was away so much. Tr. 1008:2-19; 1009:4-23; 1042:1-11.

Appellant Gollaher testified that he was in construction business since he was 17 years old. He served



in the Navy and was wounded in action during World War II. Tr. 986:14-987:2. During his career he had built some 10,000 homes with a total cost of more than \$15,000,000. Tr. 989:16-17. Through the years he had dealt with both the VA and the FHA and his relationship was satisfactory. Tr. 990:8-15. Sometime in May of 1962, someone had started some rumors about him, and he asked the FHA to investigate, and the FHA advised him that his operations were proper and satisfactory. Tr. 1007:4-20.

About this time he had incurred the wrath of certain persons at the FHA because of personality conflicts.

Mrs. Barbee, Mr. Barboza, McDaniel and Holt were shown to have acted for their own purposes and benefits. Each was shown to have strong motives to lie and place blame for any irregularities on appellants. Mrs. Barbee, after being approached by the FBI, said she was not going to take any blame alone. Tr. 1194:21-23. Mrs. Barbee, who was an actual defendant, was the prime prosecution witness to incriminate appellants. Her sentencing was delayed until after trial of appellants, and her eventual sentence was suspended. Holt admitted on the stand that he falsified a company invoice and deposited a corporate check in his personal account.

In addition, none of the prosecution witnesses





gave specific and direct testimony. They were vague, general and conclusionary. For instance, Mrs. Barbee and Mr. Barboza testified that the Holt transaction (and others) were discussed at weekly sales meetings. Tr. 220:10-13. The only disinterested witnesses were Robert Maus and John Mullen, (Tr. 1176:19 to 1178:12; 1053:11 to 1055:4) who were present throughout those meetings and denied that any mention of any illegal transaction regarding the sale of VA loan rights was made.

Appellant Gollaher testified that Gene Morgan and George Knapton, real estate brokers for him at various times, were close to Mrs. Barbee and that Morgan was fired for stealing down payments. Tr. 1010:1-19; 1012:11-25.

Gollaher testified that his companies purchased almost \$275,000 to \$300,000 worth of lumber in 1962 and 1963 from Holt, that a discount was always allowed, and that the accounts were never in arrears. Tr. 1016:10-15; 1022:3-9.

#### C. Coercion of Government Witnesses

##### (1) Evelyn Barbee

The record shows that Evelyn Barbee, a co-defendant, was first contacted by the FBI on approximate-





October 20, 1964. T. 360:18-25. Mr. Emonts of the FBI telephoned her in November of 1964, and she refused to talk with him. T. 361:5-12; Mr. Greiner of the FBI contacted her in January 1965, but she did not talk with him. T. 361:13-25. She was asked to contact the United States Attorney's office, and she did not. T. 365:3-6.

Thereafter she was summoned before the grand jury on March 3, 1965. T. 366:6-7; 439:12-14. At her appearance before the grand jury, Mrs. Barbee first learned that she was a potential defendant, and was under suspicion for crime. T. 389:4-6. She was told by Asst. U.S. Atty. Mitchell while she was before the grand jury that any cooperation she gave would be made known to the court at the time she was sentenced. T.400:1-4.

At the grand jury session, Mitchell told her that the government wished to make it clear that any information she gave, any cooperation, whether it be cooperative government witness, after her case was disposed of, all aid she would give to the federal government will be made known to the court at the time of her sentencing. Mitchell closed that statement with: "Have I made myself clear?" T. 401:16 to 402:3. Mitchell called a recess and then, upon resumption of the grand jury hearing, he told Mrs. Barbee that he was not trying to twist her arm. T. 402:7-12. At the grand jury hearing, Mrs. Barbee gave



general testimony about appellants. At the close of the hearing, she was told that she would be called back the following week to give details unless she would talk with the FBI. Her grand jury testimony is Ex. 25.

Numerous conferences with the U.S. Attorney were held by Mrs. Barbee while the trial was in session. T. 448:6-450:4.

(2) Charles Barboza

Charles Barboza is a sickly man, suffering from diabetes. He was called before the grand jury on January 26, 1966. He denied all knowledge of wrongdoing in relation to the Gollaher organization. T 644:16-15:4 to 677:10. As that hearing closed, Mr. Miller who conducted the grand jury hearing said to Mr. Barboza:

"Let me advise you that perjury before a federal grand jury is a criminal offense, punishable with a possible term of imprisonment of, I think, five years and/or a fine if a conviction and sentence erupt therefrom."

T. 644:23 to 645:3. Barboza was further questioned at that session and denied any wrongdoing. T. 645:11-21; 678:22 to 677:10.

After the grand jury session Barboza had a conversation with Miller in Miller's office. T. 649:17-21. Ex. 59.





The next morning Barboza changed his story and inculpated Gollaher. Ex. 60.

(3) Lloyd McDaniel

Lloyd McDaniel was contacted by Mr. Emonts of the FBI in February of 1964. T. 7015:3-9; 800:9-14. In March he spent about an hour at the FBI office. Emonts took a statement from him, and McDaniel signed it. T. 722:3-723:13. Later Emonts and another FBI agent came to the McDaniel home. T. 725:17-22. The FBI men stayed about 45 minutes and questioned McDaniel. T. 726:17:22. He did not have the benefit of counsel. T. 734:20 to 735:9.

McDaniel appeared before the grand jury in March of 1965. T. 716:8-19; 801:16-18. He said he lied at his first appearance. T. 716:20-23.

At the grand jury, an Assistant U.S. Attorney called him into a room and told him: "Mr. McDaniel, you are here as a witness defendant. It all depends on which way the grand jury wants to go." T. 729:12-20. He testified for about an hour. T. 730:7-8.

At the first hearing, McDaniel was asked whether he would answer questions or would invoke his privilege against self-incrimination. He had not consulted counsel. T. 803:11-25. McDaniel said he would "answer to the truth."





T. 804:11-12. He was told he could refuse to testify.  
T. 805:7-12. McDaniel testified he purchased the FHA  
and VA homes (T. 807:1 to 809:25) but did not move into  
the VA home because his wife did not want to. He said  
he made a \$25.00 down payment on the VA home. T. 810:4-5.  
At one point McDaniel refused to answer a question re:  
the subject of a conversation he had, prior to his grand  
jury appearance, with Mrs. Barbee. T. 813: 19 to 814:6.

At that point, the Assistant U.S. Attorney  
threatened to take McDaniel before a district judge for an  
order compelling him to answer on penalty of contempt.  
T. 814:8-12. McDaniel said that his reaction to the  
remark was: "I was real scared . . . . That shook me  
up real bad." T. 814:13-15.

McDaniel then answered the question, and said  
he told Mrs. Barbee: "Well, I am going to tell the truth  
and that's it." T. 815:17-22. Then Mr. Mitchell said to  
McDaniel: (T. 818:5-10)

"I think I would like to do this, Mr. McDaniel,  
I would like to take a 4 or 5 minute recess, with the  
permission of the foreman, and I would like you to go  
out into the witness room and think about this. I would  
like to remind you that we have had other witnesses be-  
fore the grand jury . . . ."

Then Mitchell said:



"No. 1, the facts that at the present time, you are at most a potential defendant and possible a cooperative government witness . . . . (T. 819:7-9).

"The grand jury, of course, is only interested in the truth in the matters it is investigating. I would like to tell you that I don't think you have been completely frank with us. I think there are some areas you are completely covering up and possibly concealing. I think there are other areas where you have possibly been untruthful. (T. 819:16-25)

"Now if I am wrong, I would like you to come back in here in 4 or 5 minutes and tell me about that." T. 820:5-10.

McDaniel said the procedure caused him to become upset, and he was scared. T. 821:5-8. When he returned to the grand jury room, he was frightened and scared. T. 821:22-25.

At the grand jury, Mitchell, then asked, whether there was anything in his testimony so far or his statement to the FBI that he wished to change. T. 822:22 to 823:2.

McDaniel told the grand jury and Mitchell that he had asked for counsel before he signed the statement for Mr. Emonts, but the agent asked him whether he had





ever been arrested before. T. 823:9-15. That statement by the FBI agent "scared" and "shook up" McDaniel because by using the expression "before" McDaniel assumed Emonts was going to arrest him then. T. 823:13 to 825:20; 826:3-22.

McDaniel continued his testimony before the grand jury and did not testify to any improper activity by appellants. T. 828, 829, 830, 831, 832, 833.

Then the episode of the metal box started. T. 833. McDaniel indicated he had had cash in a metal box used for the downpayment on the FHA home. T. 833:1-8. The box was apparently kept in the basement of his parents' home. T. 833:9-14

Then, before the grand jury, Mitchell said to McDaniel:

"Is it your position then that any testimony you may give concerning this black box in your mother's house may tend to incriminate you personally and make you a defendant in the eyes of the grand jury? T. 834:12-15.

"You have this right and this is an absolute constitutional right. If you so desire you may take the Fifth Amendment. This is a decision you will have to make yourself." T. 834:19-22.





"I would remind you that there is a perjury statute." T. 835:1-2.

"And I will tell you quite frankly that I don't think you have been honest with the grand jury." T. 835:10-12.

Before the grand jury, McDaniel was questioned about the exact location of the metal box, (T. 836:17-22) and then the following discussion took place:

MITCHELL: "Do you have any objection to my stepping out of the grand jury room, and would you consent to this in writing, in having the FBI agent in Fresno going immediately to your house and get that black box at the present time." T. 837:5-9.

McDANIEL: "Well, that's unconstitutional, isn't it?" T. 837:12.

MITCHELL: "Giving consent to this, if you are telling the truth, there is no reason you shouldn't." T. 837:17-19.

"You can consent to this. If you are telling the truth, there is no reason you shouldn't; if you aren't, you should take the Fifth Amendment, because you perjured yourself." T. 838:1-5.

Mitchell further pressured McDaniel before the grand jury and the following colloquy took place:



MITCHELL: "Would you give permission for an agent of the Federal Bureau of Investigation to go to your house right now and check it out." T. 838:16-18.

McDANIEL: "Because it has my personal papers in there, I think we have a constitutional right to have a right to our papers." T. 838:21-23

MITCHELL: "You have an absolute right. I just want the agent to check and see if there is such a box there at the present time. T. 839:3-5

McDANIEL: "No, I don't want nobody to go in my home, my house." T. 839:9-10.

MITCHELL: "You won't give an agent of the FBI that permission then?" T. 839:12-13

McDANIEL: "No, sir." T. 839:14.

MITCHELL: "Suppose I call your wife and your wife find (sic) the box. I can make a phone call from the office. Would you be willing to have your wife deliver the box to an agent of the FBI? T. 839:17-20.

"He could wait outside your house."  
T. 839:25.

McDANIEL: "No." T. 840.2

Then Mitchell threatened to involve McDaniel's





parents who were elderly and sickly. The following transpired:

MITCHELL: "Has your mother seen (the box)?"

McDANIEL: "Yes."

MITCHELL: "She has. So if she were brought before the grand jury, she would be able to answer concerning that particular box and remembering, isn't that correct?"

McDANIEL: "I doubt if she would remember it. She is almost dead." Tr. 840:15-25

MITCHELL: "Is that the only reason? How about your father?" Will he remember?" T. 841:24-25

McDANIEL: My poor dad can't hardly get down the basement. He has a hard time of it, but he makes it." T. 842:4-5

Prior to his trial testimony, Assistant U.S. Attorney Miller told McDaniel that perjury was a serious crime. T. 848:1-2. Prior to the second grand jury appearance, McDaniel was told: "there was no criminal prosecution, if" he "gave truthful answers." T. 859:21-22

Finally, Mitchell threatened to call McDaniel's wife before the grand jury:





MITCHELL: "Now, Mr. McDaniel, do you have children? . . .

"I just wanted to check and see whether or not a subpoena for your wife would in any way inconvenience you as far as children are concerned."  
T. 861:3-7.

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the 4th, 5th, 6th and 8th Amendments to the Constitution of the United States.

The statutory provisions are 18 U.S.C. 1001 and 18 U.S.C. 3481.

All are set forth in relevant part in Appendix A.

#### SPECIFICATION OF ERRORS RELIED ON

1. The District Court erred in denying a motion to dismiss the indictment and in denying a motion for judgment of acquittal, which motions were based on the fact that Appellant Gollaher, when a potential defendant, was subpoenaed before the federal grand jury, and compelled to testify without presence of counsel and without adequate warnings re: self-incrimination. R. 41-42; 94; 242.



2. The District Court erred in denying a motion to dismiss the indictment, which motion was based on the fact that appellants had already been punished by being forced out of business by two agencies of the government for the same/<sup>alleged</sup> acts and transactions. R. 42-43; 94.

3. The District Court erred in denying a motion for judgment of acquittal or for a new trial, which motion was based on the fact that testimony of coerced witnesses was used to convict appellants. R. 219; 222; 242.

4. The District Court erred in overruling certain objections, i.e. objections to the introduction of evidence that some of the homes sales resulted in foreclosures and financial loss to the Government and to some homebuyers. T. 16: 588; 710-712; 1298 - (Objection made. R. 17).

5. The District erred in refusing to permit defense inspection of an FHA file on appellants and of grand jury testimony of George Knapton and Gene Morgan. T. 971-974; 635: 15-19; Exs. 36, 37 and 38.

6. The District Court erred in denying a motion to dismiss the indictment, which motion was based on the ground that a mis-statement of a \$25.00 down





payment on a VA home loan application is not material fraud. R. 40-41; 94.

7. The District Court erred in denying a motion for a new trial, which motion was based on the ground that there was no evidence to support a conviction against appellant corporation. R. 219; 242.

8. The District Court erred in considering at the time of sentencing the fact that Appellant Gollaher took the stand to defend himself at trial and refused to make a statement incriminating appellants after conviction. R.\*

9. The District Court erred in overruling objections to leading and prejudicially erroneous questions asked by the prosecutor regarding "false" statements. T. 202-208; 211-213. (Objection made T. 202-203).

#### QUESTIONS PRESENTED

1. Whether it is a violation of the 5th Amendment right against self-incrimination and the 6th Amendment right to counsel to subpoena and interrogate before the grand jury, a potential defendant, upon whom suspic-

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\*

Page and line reference to be supplied.





ion has focused, without permitting or providing him counsel, and without warning him of his right to refuse to testify at all. Does such violation make the indictment a nullity and make the use of his grand jury testimony at trial reversible error?

2. Whether it is a violation of the 5th Amendment rights against double jeopardy and double punishment and 8th Amendment rights against cruel and unusual punishment for the Government to bring criminal charges against a building contractor, after two agencies of the Government have suspended the contractor from his right to conduct business and have forced him out of business for the same alleged acts and transactions, where the suspension has caused the contractor extensive financial loss, and where the two governmental agencies have refused to grant the contractor a hearing on the suspension on orders of the U.S. Attorney until after the criminal proceedings are over.

3. Whether it is a violation of due process of law under the 5th Amendment for the Government to bring criminal charges against a building contractor after two agencies of the Government have suspended the contractor from his right to conduct business for the same acts and transactions, where the suspensions were made without a hearing, and where the contractor re-



quested a hearing, but was refused a hearing on orders of the U.S. Attorney until after the criminal proceedings were concluded, where the result of denial of hearing was to allow the Government to deprive defendants from an opportunity to learn the witnesses' testimony before trial and give the Government an opportunity to coerce the witnesses into giving testimony favorable to the Government.

4. Whether appellants' rights under the 4th Amendment against illegal searches and seizures and the 5th Amendment due process were violated by introduction into evidence of testimony obtained from witnesses in violation of the witnesses' rights against self-incrimination and to assistance of counsel, and where the testimony was obtained from the witnesses through promises of leniency or threats of prosecution.

5. Whether it was improper for the Government to present evidence in a prosecution charging the making of false statements to the Government that financial loss was suffered by the Government and some homebuyers as a result of those alleged statements.

6. Whether it was error for the Government to refer at trial to the fact that one James Tripp was convicted of a similar offense for which appellants were on trial.





7. Whether the defense was deprived of an opportunity to present its case fully, where the court refused inspection of grand jury testimony of two men, not called as trial witnesses, and refused inspection of an FHA file concerning appellants.

8. Whether a mis-statement that a \$25.00 down payment was made on purchase of a VA insured home is a material fraud under 18 U.S.C. 1001.

9. Whether the evidence is insufficient to support a conviction against a corporation which was not a party to any of the alleged illegal transactions.

10. Whether appellants' rights to defend themselves at trial (6th Amendment) and against self-incrimination (5th Amendment) were violated by the trial judge's consideration at time of sentence that Appellants stood trial, testified and after conviction refused to make incriminating statements.

11. Whether it was prejudicial misconduct on the part of the prosecutor to phrase his questions in such a way as to suggest that "false" statements were made to the Government.





## SUMMARY OF ARGUMENT

Calling appellant Gollaher before the federal grand jury while he was a de facto defendant, nullified the entire proceedings. Failure to warn him that as a potential defendant he did not have to testify at all violated his rights under the 5th Amendment. Interrogating him before the grand jury without counsel present violated his rights under the 6th Amendment. Prejudice is shown by the fact that his testimony before the grand jury was used to impeach him at trial and was used as affirmative evidence.

Since appellants were suspended by the VA and FHA without an administrative hearing, they were punished by deprivation of livelihood, and therefore placing them on trial and sentencing them for the same acts and transactions for which they were suspended constitutes double jeopardy and double punishment in violation of the 5th Amendment, and cruel and unusual punishment in violation of the 8th Amendment.

The prosecution so pilloried and coerced its witnesses in violation of their constitutional rights that use of that testimony resulted in a conviction based on illegally-obtained evidence and thereby deprived appellants of their due process rights.



Further instances of prosecution misconduct were: the attempt of the prosecution to prove that the government and some of the homebuyers suffered monetary loss by virtue of the acts of appellants; questions of the prosecutor were phrased in an inflammatory and prejudicial manner by reference to "false" statements; and reference was made that one Jim Tripp had been convicted for making false statements to the FHA.

Refusal of the trial court to allow defense discovery of the contents of grand jury testimony of Gene Morgan and George Knapton and of an FHA file hampered appellants in their attempt to prepare and present their defense.

Fraud charged in Counts 1, 4 and 6 referring to \$25.00 down payments in the deposit receipts was not material fraud and was not relied on by the government agency. No down payment is required by the VA, and the VA does not approve or disapprove of home loan guarantees for existence or lack of a \$25.00 down payment.

No evidence connects appellant corporation with any of the transactions charged. Appellant corporation neither constructed nor sold the homes involved in this case.

Procedures following at sentencing were im-





proper because the court meted out a harsh sentence because appellant Gollaher would not confess to the crimes of which he was convicted, in violation of his 5th Amendment rights against self-incrimination. The harsh sentence was imposed because appellants stood trial and defended themselves rather than plead guilty.

## ARGUMENT

### 1.

THE CONVICTION MUST BE REVERSED BECAUSE APPELLANT GOLLAHER WAS COMPELLED TO TESTIFY BEFORE THE GRAND JURY AFTER SUSPICION HAD ALREADY FOCUSED ON APPELLANTS.

This assignment of error has two facets: violation of 5th Amendment rights against self-incrimination and 6th Amendment rights to effective assistance of counsel.

When Gollaher was subpoenaed before the federal grand jury, the government was already investigating him and the appellant corporation. He was told he was a potential defendant. An investigation had commenced in June of 1963. Appellants were the target of the investigations, and the prosecution had a then present intention to seek an indictment against appellants at the time of





that grand jury appearance.

Suspicion had certainly focused on appellants; they were defendants in a real sense, and the grand jury appearance was a means of eliciting a statement from appellant Gollaher which would have the effect of convicting appellants. The accusatory stage had been reached.

No police official in the United States could have forced Gollaher to give a statement, but the U.S. Attorney using the grand jury as his tool did in fact compel certain responses from Gollaher which were later used to impeach his trial testimony. Tr. 1081:4 to 1083:22; 1084-1085; 1135:16-25.

The position of appellants at that time was clear. They were in reality defendants, not mere witnesses. Not only did they have a right against self-incrimination; i.e. not to answer particular questions, but they had a more pervading right, a right not to take the stand at all.

Title 18 U.S.C., Sec. 3481 provides in relevant part:

"In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person



charged shall, at his own request, be a competent witness. . . . " June 25, 1948, c. 645, 62 Stat. 833.

To compel Gollaher by subpoena to testify before the grand jury was a violation of constitutional rights. A defendant is not required to claim the privilege. The law grants him this protection which he may waive, but only where the waiver is intelligently made. Waiver of constitutional rights is never presumed.

In the past there has been some split of authority on the propriety of calling a potential defendant before the grand jury. (Annotation 38 ALR 225; cf. U.S. v. Edgerton (1897 D.C. Mont.) 80 F. 374 with U.S. v. Scully (2 Cir. 1955) 225 F. 2d 113 and U.S. v. Cleary (2d Cir. 1959) 265 F. 2d 459). However Escobedo v. Illinois and Miranda v. Arizona have settled the issue in favor of the rights of the defendant.

In Miranda v. Arizona 384 U.S. 436, at page 467, the Court said:

"Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of





action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of incustody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.

\* \* \*

"The Fifth Amendment privilege is so fundamental to our system of constitutional rule and the expedient of giving an adequate warning as to the availability of the privilege so simple, we will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given. (p. 468)

\* \* \*

"The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the





individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of foregoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system - that he is not in the presence of persons acting solely in his interest.

"The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process."  
(p. 469)

Certainly the warnings required by Miranda were not afforded Gollaher.



It might be argued that the Gollaher interrogation before the grand jury was not incustody interrogation, but measured by the realities of the situation, was Gollaher free to disregard the subpoena? Once before the grand jury could he refuse to answer all questions? The answer to both of these questions is: Had Gollaher refused to appear or answer questions he would have been cited for contempt. Suffice it to say in the words of Miranda, p. 477, Gollaher was "otherwise deprived of his freedom of action in[a] significant way." He was a captive witness.

The abuse of the practice followed here was pointed up in Powell v. United States, (D.C. Cir. 1955) 226 F. 2d 269, 274, where the court said:

"No doubt it would be a boon to prosecutors if they could summon before a grand jury a person against whom an indictment is being sought and there interrogate him isolated from the protection of counsel and presiding judge and insulated from the critical observation of the public. But there is a serious question whether our jurisprudence, fortified by constitutional declaration, permits that procedure."

The serious question alluded to by the court has now been answered by Escobedo and Miranda.





The presumption of prejudice by denial of constitutional rights is clear in the further circumstance that Gollaher had no counsel before the grand jury. The government had counsel. See Canon 9, Canons of Ethics of the American Bar Assn. cited in Escobedo v. Illinois 378 U.S. 478, 487 ftn. 7

The quandary of a potential defendant subpoenaed before the grand jury is described in a recent paper:

"One of these abuses seems to be the widespread practice of subpoenaing a potential defendant to testify before the grand jury and denying him the right to counsel while he undergoes questioning in the secret atmosphere of the grand jury room. A potential defendant who is brought before the grand jury without an attorney at his side is almost helpless. He is faced with a barrage of questions, often improper in the normal judicial setting, thrown at him by a group of reasonably intelligent citizens excited at the prospect of playing both lawyer and detective. This torrent of interrogation is, of course, directed by a skilled prosecutor capable of utilizing the grand jury as a tool to obtain incriminating evidence from the mouth of a nervous witness. The upset





and confused witness does not know whether to respond to the questions and risk having his answers used against him at a trial or claim the Fifth Amendment, creating suspicion in the eyes of the jurors and risking a contempt charge. In this atmosphere, the proceeding takes on the attributes of a Star Chamber.

"There is no comparable institution in our entire society which sanctions secret interrogation of a person 'legally' denied access to counsel."

Meshbesher, Right to Counsel Before Grand Jury,  
41 F.R.D. 189, 190.

It can be assumed that at best the assistant U.S. attorney interrogating Gollaher told him he could have counsel outside the grand jury room. That procedure places on a de facto defendant the burden of determining whether a particular question is possibly incriminating signalling the necessity to dash out of the room to consult counsel.

As pointed out by two former assistant U.S. attorneys:

"Of course, counsel in advising his client how to react in the face of possible future interrogation can never anticipate every possible



question and every conceivable accusation that may be put to his client. The argument, then, reduces itself to the proposition that not only should a defendant be made aware of his rights, but that he is entitled to be advised at each step of the interrogation concerning whether or not to respond and how to respond, i.e., the tactics of the defense."

Enker & Elsen, Counsel for the Suspect: Massiah v. U.S. and Escobedo v. Illinois, 49 Minn. L. Rev. 47,64; see also Herman, The Supreme Court and Restrictions on Police Interrogation, 25 Ohio State L.J. 449, 476-481, 486-487.

Certainly what happened at the grand jury hearing could "affect the whole trial."

Hamilton v. Alabama,

368 U.S. 52, 54.

White v. Maryland,

373 U.S. 59

Appellants no less than the government were entitled to the tools of combat, i.e. counsel, in the grand jury room.

"The situation facing the witness before the grand jury, therefore - one in which he will have 'to shift for himself' - is fraught with peril, for





'it is now universally conceded that a witness may be impeached in any subsequent trial \* \* \* by self-contradictory testimony given by him before the grand jury. Similarly, the admissions of a party made in testifying before the grand jury are admissible against him although he does not take the stand at the trial'."

Meshbesher, supra, 41 F.R.D. at p. 191

The Court in Miranda makes particular mention of the need for counsel during interrogation, not merely before.

"Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires."

Miranda v. Arizona, supra,  
384 U.S. at p. 470.

The deprivation of appellants' constitutional rights necessitates reversal, particularly since improper questions asked before the grand jury were used as admissions and to impeach Gollaher at trial. (Tr. 1081:4 to 1083: 22; 1084; 1135: 16-25.)





PLACING APPELLANTS ON TRIAL AND SENTENCING THEM AFTER SUSPENSION BY THE FHA AND VA CONSTITUTES DOUBLE JEOPARDY, DOUBLE PUNISHMENT AND CRUEL AND UNUSUAL PUNISHMENT.

Appellants were and are building contractors in California. During the years from 1960 to 1964, they built homes in the area of Fresno, California, in low and moderate price ranges. Such homes could only be sold with home loan guaranties of the Veterans Administration, and of the Federal Housing Administration.

During the 1962-1963 period, as alleged in the Indictment, certain homes, built by petitioners, were allegedly sold to persons qualified under VA or FHA regulations to obtain loan guaranties.

Sometime in December 1964, appellants moved their place of business to the San Jose, California area, and began construction of a tract of homes. All preliminary plans and specifications were approved by the FHA. Model homes were built and a sales campaign was begun. The homes were in a price range where FHA and VA home loan guaranties were essential. Buyers could seldom make the necessary down payments to qualify for the so-called conventional loans from banks or savings and loan associations.



A tract of approximately 400 homes was contemplated and on completion of the tract and the sale of all homes, appellants estimated a profit of \$1,800,000.00. Numerous contracts for labor and material, financing and sales were entered into by appellants. While construction of the tract was under way, appellants received word from the FHA that they were being suspended from eligibility to receive FHA benefits. Thereafter the FHA ban was lifted. Ex. U, R. Tr. 1076:2-- 1077:10.

In or about November of 1965, appellants applied for VA loan guaranties. On or about December 23, 1965, the VA sent appellants a letter stating that they would refuse to appraise the project, which meant that no VA loan guaranties could be had. R. 35-36.

Appellants then duly requested a hearing from the VA on the alleged charges, but were told that a hearing would not be held because of a communication by the United States Attorney not to hold a hearing until after criminal action was disposed of. A copy of that letter is Ex. T at trial. R. 1074:8-17.

The necessity for immediate relief was so urgent that within a few days after the hearing, because of failure to receive an administrative hearing, appellants were forced to sell their interests in the tract at a loss approaching \$1,500,000, because of the suspension. R. 33-34.





This is not a case of distinct civil and criminal remedies being used against an alleged law violator. All of the retributive acts of the government partook of criminal penalties because of the active participation of the United States Attorney. By being placed on trial for the crimes alleged in the indictment, appellants are being subjected to double jeopardy and double punishment for the same alleged acts.

In re Nielsen (1889)

131 U. S. 176, 182-183, 185;

In re Snow (1887)

120 U.S. 275, 285-286;

Grafton v. U.S. (1907)

206 U.S. 333, 351-352.

Since appellants have been punished by deprivation of their means of livelihood, it is repugnant to due process of law to permit the same sovereignty to punish an accused twice for the same offense, and it constitutes cruel and unusual punishment under the Eighth Amendment as well.

Ex Parte Lange (1874)

85 U.S. (18 Wall.) 163, 170-178;

In re Bradley (1943)

318 U.S. 50;

Trop v. Dulles,

356 U.S. 86.





To deprive one of the means of his livelihood constitutes punishment according to two leading cases: Ex Parte Garland, 71 U.S. 333 and Cummings v. Missouri, 71 U.S. 277.

In the Garland case, an attorney moved for leave to practice as an attorney before the Court. It was required that beforehand he take an oath that he had not voluntarily borne arms against the United States during the Civil War. He received a presidential pardon and amnesty for any acts committed on the condition he take the oath. He could not properly take the oath. Garland argued a violation of the Fifth Amendment that no one shall be deprived of life, liberty or property without due process of law.

The Court, through Justice Field, held that the right to practice a profession is property, and stated at p. 370:

" . . . exclusion from any of the professions or any of the ordinary avocations of life for past conduct can be regarded in no other light than as punishment for such conduct."

He went on to say that the practice of a calling "is something more than a mere indulgence. It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency." p. 370.



The Cummings case involved a priest who refused to take the oath of loyalty. The Court said:

"The deprivation of any rights, civil or political, previously enjoyed, may be punishment; the circumstances attending and the causes of the deprivation determining this fact. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, guardian, may also, and often has been, imposed as punishment.

\* \* \*

"The theory upon which our political institutions rest is, that all men have certain inalienable rights--that among these are life, liberty and the pursuit of happiness. All avocations, all honors, all positions are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment and can be in no otherwise defined."

p. 283.

That deprivation of livelihood represents penalty and punishment was re-affirmed by the Supreme Court in the recent case of Spevack v. Klein, 385 U.S. 511, 17 L. ed 2d 574, 577, 87 S. Ct. 625, 628.





USE OF TESTIMONY COERCED FROM PROSECUTION WITNESSES  
VIOLATED APPELLANTS' RIGHTS UNDER THE FOURTH AND  
FIFTH AMENDMENTS.

Appellants are not raising an issue of credibility which generally is in the realm of the trier of fact. The issue raised here concerns use of coerced and tainted evidence akin to use of a coerced confession and use of illegally obtained evidence.

Where the procurement of evidence has been by proved coercion violative of the constitutional rights of a witness, a serious question arises upon use of such evidence at the trial of a defendant.

U.S. v. Wolfe (7th Cir.)

307 F. 2d 798, 801.

See also: U.S. v. Flynn

130 F. Supp. 412, 416.

Turner v. Pennsylvania

338 U.S. 62, 656-66, 69 S.Ct 1352.

Mesorosh v. U.S.

352 U.S. 1, 77 S. Ct. 1

The testimony of Mrs. Barbee, Lloyd McDaniel and Charles Barboza on the face of the record was obtained through harrassment, violation of their rights





and intimidation by government agents. Use of such evidence to convict defendants was a violation of appellants' constitutional rights under the 4th and 5th Amendments.

Napue v. Illinois

360 U.S. 264, 270, 79 S.Ct.1173

The record does not indicate that any of the grand jury witnesses who were either co-defendants or co-conspirators, were warned of their right not to testify at all under 18 U.S.C. 3481. They were in fact cautioned that they were potential defendants. After threatening the witnesses with possible indictment, the U.S. attorney hammered away at the witnesses until they testified to his satisfaction.

As to Mrs. Barbee, the promises that her cooperation would be brought to the attention of the sentencing judge (As indeed it was, since she received a suspended sentence.) carried with it the converse: failure to cooperate would result in a heavy sentence. It must be recalled that Mrs. Barbee did not talk to the FBI on first contacts. It was not until after she appeared before the grand jury and heard the threats that she testified to the government's apparent satisfaction.



McDaniel testified in turnabout fashion before the grand jury after threats that his aged and sickly parents and his wife would be called before the grand jury. Barboza also testified in turnabout manner before the grand jury after a conference with Mr. Miller, assistant U.S. attorney. After his inconsistent testimony before the grand jury, Barboza could have been charged with perjury no matter how he testified. It was to his advantage, to avoid prosecution, to testify favorably to the government.

On the other hand, the record indicates that no one wanted to talk with appellants or their counsel.

This pattern of coercion must be viewed in connection with the request of the United States attorney that VA not grant defendants an administrative hearing prior to completion of the criminal aspects of the case. The hearing was denied in January of 1966, (Tr. 1074: 8-17; Tr. 967: 24 to 969:19) and Morgan and Knapton were called before the grand jury and Barboza as well, as the VA was denying appellants a civil hearing.

Denial of the administrative hearing on suspension put the government in the position of a lawbreaker, and in using the fruits of the denial of the administrative hearing at trial, the government deprived defendants of due process of law under the 5th Amendment,





By denying appellants a hearing, the government had the opportunity of coercing and preempting witnesses before the defense would have an opportunity to question those witnesses under oath.

In People v. Martin,

45 Cal. 2d 755, 290 Pac. 2d 855,

the California Supreme Court stated that a defendant may challenge deprivation of rights of third persons because "a limitation virtually invites law enforcement officers to violate the rights of third parties; and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of the evidence illegally obtained against them."

See also: McDonald v. U.S.

451, 456; 69 S. Ct 191, 193.

The purpose of excluding illegally obtained evidence is to "deter lawless enforcement of the law."

In addition to the episodes before the grand jury, there were numerous conferences various prosecution witnesses had with the prosecutor. Since none of the witnesses had counsel present, the atmosphere was inherently prejudicial under the rules of Miranda v. Arizona.

Once the government had conflicting statements under oath from McDaniel and Barboza, those two





witnesses were forced to testify as the government wished or incur the wrath of the government and the probability of prosecution for perjury. As McDaniel testified, Mr. Miller told him that if he testified to the "truth", he would not prosecute him for perjury. The inference is clear as to how McDaniel was expected to testify to avoid prosecution for perjury.

The illegally obtained testimony introduced at trial was no different from illegally obtained real evidence which is outlawed by the Constitution.

Wong Sun v. U.S.

371 U.S. 471, 488, 83 S. Ct. 407, 417.

As Justice Holmes stated, unlawfully obtained evidence should not be used at all.

Silverthorne Lumber Co. v. U.S.

251 U.S. 385, 392, 40 S. Ct. 182, 183.

4.

APPELLANTS WERE PREJUDICED BY INFLAMMATORY TESTIMONY ABOUT FINANCIAL LOSSES SUFFERED THROUGH FORECLOSURES.

Fraud was the charge. Although damage is not a necessary element of the offense, the prosecutor created a prejudicial atmosphere and inflamed the jury against appellants by eliciting testimony that various



homebuyers suffered losses because of the home loan applications involved in this case.

The losses were gone into in detail during opening statement and testimony (Tr. 16:16-25; 710:21 to 712:2; 588:9-24) and were strenuously argued in summation by the prosecutor. Tr. 1298:14-20.

In a case charging the making of false statements to the FHA or any government agency, for the purpose of obtaining favorable action, financial loss is not a necessary element of the crime.

Morgan v. U.S. (9th Cir. 1962)

301 F. 2d 272, 275.

U.S. v. Myers (DC Cal. 1955)

131 F. Supp. 525, 531.

U.S. v. Hawkins (6th Cir. 1961)

295 F. 2d 837, 839.

Cf. U.S. v. Thompson (1966)

366 F. 2d 167, 171

If the government does not have to prove loss to make out its case, then it should not attempt to prove it in any event. The sauce should be the same for both.

Evidence showing that financial losses were sustained either by the government or by individuals





should have been excluded.

Ross v. U.S. (6th Cir. 1950)

180 F. 2d 160,165.

The only purpose of alluding to such facts was to prejudice the jury against appellants.

5.

THE PROSECUTOR WAS GUILTY OF MISCONDUCT IN PHRASING QUESTIONS IN A PREJUDICIAL MANNER AND IN MAKING REFERENCE TO THE CONVICTION OF JAMES TRIPP.

The assistant U.S. attorney trying the case prejudiced appellants in the eyes of the jury by constant phrasing of questions (on direct examination of his own witnesses) in an argumentative fashion. The phrasing complained of referred to statements made to government agencies as "false" statements, when this was the very issue the jury was to decide.

This was the continuous practice of the prosecutor. A few examples follow:

"During the course of the time that you were working for the Gollaher Company did there come a time that you were aware of a practice whereby false statements were being submitted to the Veterans Administration? Tr. 202:14-17 (Emphasis added)





"How did you become aware of these false practices?" Tr. 204:10 (Emphasis added)

"Did there come a time when you yourself participated in the presentation and preparation of certain false documents which you knew were going to be submitted to the FHA and the VA?" Tr. 205:19-22 (Emphasis added)

Other examples are found in the record at Tr. 206:18; 207:9 and 12; 212:21; 213:6, 16 and 24; 215:3. At one point the court fell into the same error. Tr. 208:19; 213:8.

Objection was made to this practice without success. Tr. 202:18-20; 203:3-5.

The questions were in effect loaded, assumed something not in evidence and by repetition had a hypnotizing effect on the jurors.

The question regarding the conviction of James Tripp for FHA violations (Case No. 20535, pending in the Court of Appeals for the 9th Circuit) could only have been asked for the purpose of prejudicing the appellants. It served no legitimate evidentiary purpose. Objection was made, and the jury was instructed to disregard, but the damage was done and could not be repaired. Tr. 1080:17-19; 1080:20 to 1081:2



It is possible for counsel to commit prejudicial error by his method of direct and cross-examination of witnesses.

People v. Ozuna,

213 Cal. App. 2d 338, 28 Cal. Rptr. 663.

People v. Perez,

58 Cal. 2d 229, 241; 23 Cal. Rptr. 569, 373  
Pac. 2d 617.

Dastigar v. Dastigar,

109 Cal. App. 2d 809, 814; 241 Pac. 2d 656.

People v. Arnold,

199 Cal. 471, 494; 250 Pac. 182.

6.

APPELLANTS WERE DEPRIVED OF THE RIGHT OF PRESENTING THEIR DEFENSE BECAUSE THE COURT WOULD NOT PERMIT INSPECTION OF THE MORGAN AND KNAPTON GRAND JURY TRANSCRIPTS AND THE FHA FILE.

a. Knapton and Morgan Grand Jury Testimony

George Knapton and Gene Morgan, former real estate brokers on the housing tract, were called before the grand jury, but were not subpoenaed to testify at trial by the prosecution. Since the government did not call Knapton nor Morgan, there is reason to believe that





Knapton and Morgan could not aid the government's case, and by implication their testimony might have helped the defense case. However, the defense, knowing that the government had sworn testimony of the men, could not risk calling Knapton and Morgan.

Not having knowledge of the grand jury testimony of the men, (Ex. 91 id (sealed)) the defense could not risk calling them as defense witnesses for fear the men might be impeached by their grand jury testimony. In that sense Knapton and Morgan were not "available" as witnesses for the defense. By not allowing defense discovery of the grand jury testimony of the two men, the court deprived the defense of possibly helpful witnesses.

Brady v. Maryland,

373 U.S. 83, 86; 83 S. Ct. 1194, 1196.

In Dennis v. U.S., 384 U.S. 855, 873-874; 86 S. Ct. 1840, the Court said:

"A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. See, e.g., United States v. Bufalino, 285 F. 2d 408, 417-418 (CA 2d Cir. 1960). Under these circumstances, it is especially important that the defense, the judge and the jury should



have the assurance that the doors that may lead to truth have been unlocked. In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations."

Dennis v. U.S.

384 U.S. 855, 873; 86 S. Ct. 1840.

b. The Intra-Agency Communications

Although the government is plaintiff in this case, the FHA was one of the complaining witnesses, and the motive, bias or prejudices of the agency or its employees with respect to appellants was a matter of concern in this proceeding. The intra-agency communications in the FHA file might have shed light on motive, bias or prejudice, in other words, the attitude of the FHA in pursuing this prosecution.

The trial court cut off the defense right to pursue the question of credibility and motive of the FHA employees, who caused the prosecution to be initiated. The court, instead of reviewing the file itself, asked the prosecutor to look through the file and determine what should be made available to the defense.





The sealed documents extracted from the file are in Ex. 38 for id.

As the Court said in Dennis, p. 875:

"The determination of what may be useful to the defense can properly and effectively be made only by an advocate."

In note 20, of page 873, 384 U.S., the Court cites Alford v. U.S., 282 U.S. 687, where the Court reversed a trial court's ruling which deprived defense counsel of an opportunity to inquire into the background of a government witness.

The prosecution may not deny the defense access to evidence which may be helpful to its case, even though the evidence may be relevant only to the credibility of a witness.

Giles v. Maryland,

386 U.S. 66,70; 17 L. ed 2d 737, 744;

87 S. Ct. 793, 795.



THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE VERDICTS ON COUNTS 2, 3, 4, 5, 6, AS TO APPELLANT GOLLAHER AND ON ALL COUNTS AS TO APPELLANT CORPORATION.

One of the elementary requirements of proving fraud is a showing that the fraud was material and of a nature that it would be relied upon by a governmental agency.

Gonzales v. U.S. (10th Cir.)

286 F. 2d 118, 122.

Brandow v. U.S. (9th Cir. 1959)

268 F. 2d 559, 565

U.S. v. Breithauer (D.C. Missouri, 1963)

214 F. Supp. 820, 821.

Counts 4 and 6 charge false statements with reference to the \$25.00 down payments recorded in deposit receipts. Mr. Howarth, counsel for the VA, testified that no home loan was approved or rejected for existence or lack of a \$25.00 down payment. In fact, the VA does not require a down payment.

The inclusion of the \$25.00 specification in the other counts, 1 and 5, dealing the VA application form, so prejudiced appellants on those counts that those counts should be reversed as well.





Count 2 is not supported by evidence of fraud because appellant Gollaher gave McDaniel the down payment as a wedding gift. McDaniel testified that Gollaher gave him the money.

There is no evidence whatsoever that appellant corporation was involved in any of the transactions charged. Tr. 1084: 22-24; 1085: 4-10. The prosecutor attempted to prove there was a parent-subsidary relationship between appellant corporation and the corporation which was involved in the transaction. The evidence was that each corporation was a separate entity. A parent corporation must own at least a majority of the stock of a subsidiary corporation.

See definition of "subsidiary corporation" in Black's Law Dictionary.

8.

THE SENTENCING PROCEDURE VIOLATED APPELLANTS RIGHT TO A JURY TRIAL AND AGAINST SELF-INCRIMINATION.

At the time of sentencing, the trial judge rebuked appellant Gollaher for his failure to confess to the crimes of which he was convicted and took this failure into consideration in setting sentence. Allusion was also made to the fact that Gollaher took the witness stand to defend himself.

It was pointed out to the Court that Gollaher



was advised by counsel not to make any statements of admissions regarding the crimes charged since the judgments of conviction were not final. Other proceedings were still open to appellants, including a  
\*  
Motion for New Trial.

To compel Gollaher to confess to crimes under pain of a harsher sentence violated appellants' rights.

Thomas v. U.S. (5th Cir. 1966) 368 F. 2d 941, gives a clear exposition of the problems and issues.

In that case the trial judge said:

THE COURT: \* \* \*

"If you will come clean and make a clean breast of this thing for once and for all, the court will take that into account in the length of sentence to be imposed. If you persist, however, in your denial, as you did a moment ago, that you participated in this robbery, the court also must take that into account.

---

\*

Because of delay of the court reporter in preparing the transcript, the page and line references to the record are not available. Appellants will supply the record references by letter or in a closing brief.





Now which will it be?

\* \* \*

THE DEFENDANT: I am speaking for myself that I am innocent." p. 944

The appellate court said:

"In the case of United States v. Wiley (278 F. 2500) . . ., Judge Schnackenberg concluded the opinion of the Seventh Circuit as follows:

" ' Our part in the administration of federal justice requires that we reject the theory that a person may be punished because in good faith he defends himself when charged with a crime, even though his effort proves unsuccessful. It is evident that the punishment imposed by the district court on Wiley was in part for the fact that he had availed himself of his right to a trial, and only in part for the crime for which he was indicted.

" ' For these reasons we set aside the three years' sentence imposed and re-imposed by the district court on Wiley and we remand this case to that court for a proper sentence not inconsistent with the views herein expressed. ' "



"The language of Judge Weinfeld in United States v. Tateo, S.D.N.Y. 1963, 214 F. Supp. 560, 567, is peculiarly apropos:

"'No matter how heinous the offense charged, how overwhelming the proof of guilt may appear, or how hopeless the defense, a defendant's right to continue with his trial may not be violated. His constitutional right to require the Government to proceed to a conclusion of the trial and to establish guilt by independent evidence should not be exercised under the shadow of a penalty - that if he persists in the assertion of his right and is found guilty, he faces, in view of the Trial Court's announced intention, a maximum sentence, and if he pleads guilty, there is the prospect of a substantially reduced term. To impose upon a defendant such alternatives amounts to coercion as a matter of law.'

"It must be remembered that, at the time of his allocution, Thomas had not been finally and irrevocably adjudged guilty. Still open to him were the processes of motion for new trial (including the





opportunity to discover new evidence), appeal, petition for certiorari, and collateral attack. Indeed, appeal is now an integral part of the trial system for finally adjudicating the guilt or innocence of a defendant.

"The two 'ifs' which the district court presented to Thomas placed him in a terrible dilemma. If he chose the first 'if', he would elect to forego all of the above-noted post-conviction remedies and to confess to the crime of perjury, however remote his prosecution for perjury might seem. Moreover, he would abandon the right guaranteed by the Fifth Amendment to choose not to be a witness against himself, not only as to the crime of which he had been convicted, but also as to the crime of perjury. His choice of the second 'if' was made after the warning that the sentence to be imposed would be for a longer term than would be imposed if he confessed. From the record, it is clear that an ultimatum of a type which we cannot ignore or approve confronted Thomas. Truly, the district court put Thomas between the devil and the deep blue sea." P. 945

The sentencing procedure was improper.



## CONCLUSION

For the reasons hereinabove stated, the judgments must be reversed.

Respectfully submitted,

GERALD H. GOTTLIEB and EARL KLEIN

By EARL KLEIN  
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## APPENDIX A

### Amendment IV

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . .

### Amendment V

. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . .

### Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . .; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence.

### Amendment VIII

. . . nor cruel and unusual punishments inflicted.



APPENDIX A (Continued)

Title 18 U.S.C. Sec. 3481

In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. . . ."

(June 25, 1948, c. 645, 62 Stat. 833)





CERTIFICATE AS TO BRIEF

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Earl Klein

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Attorney



N O. 2 1 6 3 3

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FILED

FEB 7 1968

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

---

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NORTHERN DIVISION

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Title 18, United States Code, §1010	2, 3, 5, 6, 24
Title 18, United States Code, §3500	25
Title 28, United States Code, §1291	5
Title 28, United States Code, §1294(1)	5
Title 38, United States Code, §1804(b)	18, 19, 20

### Rules

#### Federal Rules of Criminal Procedure:

Rule 16	25
Rule 16(b)	25
Rule 52(b)	16





N O. 2 1 6 3 3  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ROBERT E. GOLLAHER, et al.,  
Appellants,

vs.

UNITED STATES OF AMERICA,  
Appellee.

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APPELLEE'S BRIEF

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I

STATEMENT OF PLEADINGS AND FACTS  
DISCLOSING JURISDICTION

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On March 17, 1966, the Federal Grand Jury for the Southern District of California returned an indictment in fifteen counts, naming as defendants the appellants, Robert E. Gollaher ("Gollaher" herein) and Gollaher Construction, Inc., as well as Evelyn E. Barbee.

Count One of the indictment, the only one of the fifteen counts which charged a conspiracy in violation of Title 18, United States Code, Section 371, alleges that the three named defendants,



together with eight named unindicted co-conspirators and others to the grand jury unknown, conspired to make false statements to the Veterans Administration ("VA" herein) and to the Federal Housing Administration ("FHA" herein) both agencies of the United States. These false statements were alleged to be in violation of Title 18, United States Code, Section 1001 (as to statements made to the VA) and of Title 18, United States Code, Section 1010 (as to statements made to the FHA). The gist of the conspiracy was that Gollaher instructed defendant Barbee, who was his employee, to find persons, veterans and others, qualified to purchase homes with borrowings subject to loan guarantees from the VA or to mortgage insurance issued by the FHA. These borrowers would then be induced falsely to certify to the respective agencies that they intended to purchase from Gollaher, and thereafter to occupy, those homes; these qualified borrowers would also falsely certify that they had made a down payment; such qualified borrowers who actually applied to the VA and FHA for loans guarantees and mortgage insurance, never intended to purchase or occupy the homes, and never actually made down payments on them; and the true intended purchasers and occupants of the homes were other persons, whose existence was concealed from the VA and the FHA and who would not have qualified for loan guarantees or mortgage insurance by the standards set by those agencies for prospective borrowers. The false statements were transmitted, in the form of VA forms 26-1802 and FHA forms 2004-C and deposit receipts, to the respective agencies by Gollaher and defendant Barbee; the transmittals were made





through either of two financing agencies: T. J. Bettes Company and Central Securities Mortgage Company.

Count Two charged a violation of Title 18, United States Code, Section 1010, in that the three named defendants made a specific false statement to the FHA, by submitting to the FHA a deposit receipt which falsely stated that one of Gollaher's companies had received from Lloyd and Arlene McDaniel, prospective home purchasers, the sum of \$400 on account of the purchase price of a home located at 5144 East Lamona, Fresno.

Count Three charged a violation of Title 18, United States Code, Section 1001, in that the three defendants submitted to the VA a form 26-1802 which falsely stated that Richard Hall Holt, a veteran, intended to purchase and occupy a home located at 5155 East Lamona, Fresno, and for that purpose had paid a deposit of \$25.

Count Four charged the three defendants with submitting to the VA a deposit receipt which falsely stated that Richard and Eleanor Holt had made a deposit on account of purchase price of \$25 to one of Gollaher's companies in connection with the purchase of property located at 5155 East Lamona, Fresno, all in violation of Title 18, United States Code, Section 1001.

Count Five charged the three defendants with submitting to the VA a form 26-1802 which falsely stated that Lloyd V. McDaniel, a veteran, intended to purchase and occupy a home located at 4226 North Pleasant Avenue, Fresno, and for that purpose had paid a deposit of \$25, all in violation of Title 18, United States Code,



Section 1001.

Count Six charged the three defendants with submitting to the VA a deposit receipt which falsely stated that Lloyd and Arlene McDaniel had made a deposit on account of purchase price of \$25 to one of Gollaher's companies in connection with the purchase of property located at 4226 North Pleasant Avenue, Fresno, all in violation of Title 18, United States Code, Section 1001.

Counts Seven through Fifteen similarly allege false statements made by the three defendants to the VA and FHA. Inasmuch as there was no verdict as to these counts at the trial below [R. T. 1436] <sup>1/</sup> and they are not at issue in this appeal, they are not summarized or quoted here.

On October 13, 1966, defendant Evelyn E. Barbee entered a plea of guilty to Count Two of the indictment. Appellants pleaded not guilty to all counts on October 18, 1966, and jury trial commenced at Fresno on October 18, 1966 and continued to November 4, 1966, when the jury returned a verdict of guilty against appellants on Counts One through Six of the indictment.

On December 12, 1966, after the court denied a motion for a new trial, judgment of conviction was entered against appellants on Counts One through Six of the indictment. At the same time, defendant Gollaher was sentenced to a term of two years imprisonment on each of the six counts, to run concurrently, and was further sentenced to pay a total fine of \$30,000. One year of the prison

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<sup>1/</sup> "R. T." refers to the Reporter's Transcript herein.





sentence was provided to be suspended in the event Gollaher paid the fine in full within one year. Appellant Gollaher Construction, Inc. was sentenced to pay a fine of \$6,000.

Appellant filed a timely notice of appeal on December 21, 1966.

Jurisdiction of the District Court for the Southern District of California, Northern Division, was based on Title 18, United States Code, Sections 371, 1001, 1010, and 3231.

Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

## II

### STATUTES INVOLVED

Title 18, United States Code, Section 1001, provides:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both."



Title 18, United States Code, Section 1010, provides:

"Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by such Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of such Administration, makes, passes, utters, or publishes any statement, knowing the same to be false, or alters, forges, or counterfeits any instrument, paper, or document, or utters, publishes, or passes as true any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be fined not more than \$5,000 or imprisoned not more than two years, or both."

Title 18, United States Code, Section 371, provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of





such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

"If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

### III

#### QUESTIONS PRESENTED

1. Is the question of whether Gollaher was improperly denied a right to the presence and advice of counsel at the Grand Jury proceeding properly before this Court?

2. Did the proceedings below deprive appellants of their rights not to be twice punished or twice placed in jeopardy on account of the same offense, or of their right not to be cruelly or unusually punished?

3. Does the record herein show that the Government's witnesses at the trial below, or any of them, were coerced into testifying unfavorably against appellants?

4. Did the trial court err in admitting evidence that some of the home sales, infected by and resulting from false statements made by appellants, resulted in financial loss to the



Government and/or to some of the purported purchasers?

5. Did the trial court err in refusing to permit inspection by defense counsel of certain FHA documents and of the transcript of grand jury testimony given by persons not called as witnesses at the trial?

6. Did the trial court err in refusing to find as a matter of law that Counts Four and Six of the indictment failed to allege a false statement sufficient, if proved, to support a conviction for violation of Title 18, United States Code, Section 1001?

7. Is the evidence sufficient to sustain the judgment of conviction against Gollaher Construction, Inc., a corporation?

8. Did the trial court in imposing sentence on appellants improperly consider appellants' refusal to admit guilt at the time of sentencing?

9. Did the trial court prejudicially err in overruling objections to leading or otherwise objectionable questions asked by Government counsel at the trial?

#### IV

#### STATEMENT OF FACTS

At the time of his trial in the court below, Robert E. Gollaher had been a licensed general contractor in the State of California since approximately 1950 [R. T. 988]. In northern California alone, he was responsible for the construction of about \$15,000,000 worth of homes [R. T. 989]. During the years of his





occupation as a builder, he frequently dealt with the FHA and VA, causing applications for loan guarantees and mortgage insurance to be processed and presented to those agencies on behalf of prospective borrowers who wished to purchase his homes; in general, his relations with those agencies were good [R. T. 990]. From November of 1961, Gollaher did business through three corporations: appellant Gollaher Construction, Inc.; Design Homes by Robert E. Gollaher, Inc., and G & B Construction, Inc. [R. T. 991]. During 1962 and 1963, Gollaher did business from four locations in the Fresno area [R. T. 992].

During the early part of 1962, Gollaher hired Evelyn E. Barbee [R. T. 201, 1012] as an employee. Her duties were those of receptionist, secretary, and processor of the "paperwork" on purchase money loans [R. T. 202]. Her salary at the beginning was \$90 per week [R. T. 202].

During the course of Mrs. Barbee's employment with Gollaher, in 1962 and 1963, there came a time when Mrs. Barbee was aware of a practice whereby false documents were being submitted by the Gollaher organization to the VA and FHA [R. T. 202]. This time was shortly after Mrs. Barbee began her employment [R. T. 203]. A part of Mrs. Barbee's duties was to prepare "loan packages", documents obtained from a mortgage company, covering loans as to which application would be made to the VA and FHA, and to have these signed by prospective purchasers [R. T. 219]. Gollaher had instructed Mrs. Barbee during the summer of 1962 that, when a prospective home purchaser was found unable to



qualify for financing, she was to seek a veteran who had not used his eligibility for VA home loan guarantees, and to have such a veteran complete a "loan package", including deposit receipt and certificate of eligibility, showing himself as the prospective purchaser and occupant of the house [R. T. 220-221, 251, 254, 258-259]. In return for the use of their eligibility, these veterans would receive the sum of \$300, sometimes in cash and sometimes in the form of a check signed by Gollaher [R. T. 217-218]. These veterans did not intend to move onto the property [R. T. 219]. These "loan packages" were submitted by Mrs. Barbee to a mortgage company and thence to the VA [R. T. 26-27].

During the spring of 1962, Richard Hall Holt held a conversation with Gollaher [R. T. 455]. During this conversation, and during successive weeks, Gollaher proposed to Holt that the latter should use his GI eligibility to put a non-veteran into one of Gollaher's homes. Gollaher offered Holt \$300 for the use of his VA Guarantee rights, and told Holt that this was a normal and common practice [R. T. 456]. Holt agreed, and signed a deposit receipt and an application for loan and for VA loan guarantee (See Exhibits 1-B and 1-C), falsely certifying that he intended to occupy the home at 5155 East Lamona, Fresno, and had paid \$25 as a deposit on the home [R. T. 458-459]. Gollaher himself also signed this deposit receipt, for the seller [R. T. 1067]. Holt received \$300 for the use of his VA rights, probably from Gollaher's brother-in-law and employee, Lloyd McDaniel [R. T. 459]. Gollaher told Holt not to tell anyone the true consideration for the \$300, but to say it was







payment for materials sold by Holt, who was in the lumber business, to Gollaher [R. T. 457]. Mrs. Barbee handled the paperwork on the Holt transaction [R. T. 457]. The Holt application was subsequently filed with the VA [R. T. 26-27]. (The Holt transaction underlies Counts Three and Four of the indictment herein.)

Gollaher's brother-in-law and employee, Lloyd McDaniel, figured as purported purchaser in at least two home purchase transactions with Gollaher. McDaniel was employed by Gollaher approximately from January 1962 to October 1963, to do estimating, cost accounting and general office work [R. T. 702]. During 1962, under date of June 10, 1962, McDaniel at Gollaher's instigation [R. T. 705] signed an application for a loan including an application for FHA mortgage insurance (See Exhibits 8-B-1 and 8-A-3); on the latter application and on a deposit receipt which he signed, McDaniel falsely stated that he had made a deposit on the purchase price of a Gollaher home in the amount of \$400 [R. T. 703]; this home was located at 5144 East Lamona, Fresno. In fact Gollaher himself furnished the down payment for this house [R. T. 705]. McDaniel's application was subsequently received by the FHA [R. T. 92]. In addition to her work with the VA Mrs. Barbee submitted to a lending institution, for transmittal to the FHA, this deposit receipt signed by Lloyd McDaniel, which falsely stated that McDaniel had made a down payment on the home which he was buying from Gollaher's organization [R. T. 237-238]. This transmittal occurred in June of 1962 [R. T. 92]. In July of 1962, after the Gollaher organization had submitted this application for loan to



the T. J. Bettes Company, a lending institution, Gollaher told McDaniel that he had resold the home and that McDaniel and his wife should not move into it [R. T. 706].

Lloyd McDaniel also submitted an application in connection with a second home, located at 4226 North Pleasant, Fresno, under date of August 24, 1962. In that instance, Gollaher told McDaniel that if the latter would allow Gollaher to make use of McDaniel's eligibility for VA loan guarantee, Gollaher would see that McDaniel was paid \$300 [R. T. 708]. McDaniel signed an application for VA loan guarantee, which falsely stated that he intended to occupy the home at 4226 North Pleasant and also falsely stated that he had made a deposit in the amount of \$25 toward the purchase of that home (See Exhibits 2-D and 2-E) [R. T. 708-709]. After this application was submitted by the Gollaher organization to the VA, Gollaher never paid McDaniel the \$300 he had promised [R. T. 710]; ultimately McDaniel was held responsible for a deficiency following foreclosure on this home, in the amount of \$1,029.27 [R. T. 711]. At the time when McDaniel's VA loan application was processed for Gollaher by Mrs. Barbee, Gollaher told Mrs. Barbee to process the loan through Central Securities Mortgage Company rather than T. J. Bettes Company, since the latter company had just processed the FHA loan for McDaniel and might be suspicious that McDaniel was applying for another loan so soon [R. T. 254-255]. (The McDaniel transactions underlie Counts Two, Five and Six of the indictment herein.)

At the trial below, Gollaher himself took the stand. He







testified that the down payment on the home at 5144 East Lamona, which he admitted he himself made on behalf of Lloyd McDaniel, was a wedding gift to McDaniel and his wife [R. T. 1068], rather than a payment made by Gollaher to induce the FHA to insure the mortgage on that home. Gollaher also testified that he did not agree to purchase the veterans' entitlements of Richard Holt and McDaniel and had no knowledge of those transactions [R. T. 1070, 1039-1040].

## V

### ARGUMENT

A. THE QUESTION OF WHETHER GOLLAHER  
WAS IMPROPERLY DENIED A RIGHT TO  
THE PRESENCE AND ADVICE OF COUN-  
SEL AT THE GRAND JURY PROCEEDING  
IS NOT PROPERLY BEFORE THIS COURT.

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The gist of appellants' first argument is stated at page 33 of their brief, wherein they argue:

"Calling appellant Gollaher before the federal grand jury while he was a de facto defendant, nullified the entire proceedings . . . Interrogating him before the grand jury without counsel present violated his rights under the Sixth Amendment. Prejudice is shown by the fact that his testimony before the grand jury was used to impeach him at trial and was used as affirmative evidence."



It has long been clear that a potential defendant -- often termed the "subject" of a grand jury investigation -- may be subpoenaed to testify before the grand jury that may subsequently indict him, and that such a procedure does not violate the Fifth Amendment. In United States v. Winter, 348 F.2d 204 (2nd Cir. 1965), cert. denied 382 U.S. 955, the Second Circuit stated:

"To suggest that once an individual is named by witnesses before a grand jury under circumstances which may lead to his indictment he thereby automatically gains immunity from subpoena would denude that ancient body . . . of a substantial right of inquiry."

348 F.2d at 207.

And see, United States v. Scully, 225 F.2d 113, 116 (2nd Cir. 1955).

Indeed, a potential defendant may be subpoenaed before the grand jury which may indict him even if he has previously been arrested on a warrant charging the same offense as that under investigation by the grand jury.

United States v. Cleary, 265 F.2d 459 (2nd Cir. 1959),  
cert. denied 360 U.S. 936.

In this case, of course, Gollaher had not been arrested on a warrant, or arrested at all, on the charges under investigation by the grand jury. In fact he was only one of several persons, including Mrs. Barbee who was subsequently indicted, who were under investigation in connection with VA and FHA frauds in Fresno.





But appellants contend that the foregoing rules have been negated by the holding of the United States Supreme Court in Miranda v. Arizona, 384 U.S. 436 (1966). They contend in essence that, following Miranda, a potential defendant appearing before a grand jury is to be considered the focus of suspicion while he is in the grand jury room, that interrogation by the grand jury is in fact and in effect in-custody interrogation, and that such a potential defendant is therefore entitled to have counsel with him in the grand jury room during interrogation. Gollaher was not, of course, afforded such presence of counsel. Appellants cite no authority for these propositions, except for Miranda itself, nor do they contend that Gollaher was not warned of his rights not to make a statement.

Although it would undoubtedly be instructive to consider these arguments of appellants, they are not material to any issue on this appeal. For it is not true, as appellants urge, that the effect of a violation of the Miranda rules, if they were violated, is to nullify any subsequent proceedings based upon the same subject matter as the illegal interrogation. Rather, the effect is only to exclude from evidence any statements made in a context violative of the rules.

Miranda v. Arizona, 384 U.S. 436 at 445 (1966).

It is true that Gollaher made statements to the grand jury in connection with the subject matter of the later indictment, and that these statements were used by the Government counsel below on cross-examination after Gollaher took the stand to testify at his own trial. They were used to impeach Gollaher, in a fairly



extensive manner [R. T. 1081-1083; 1135-1136]. The record shows that defense counsel at no time objected to the introduction of these statements on the basis that they were elicited in violation of the Miranda rules. The only objection by defense counsel to the admission of these statements was made on the basis that some of them were conclusory [R. T. 1082, 1083]; this objection was overruled by the trial judge. Nor did appellants file a pretrial motion to suppress Gollaher's statements.

Not having objected or preserved any objection to the admission of Gollaher's statements before the grand jury at trial, appellants are foreclosed on appeal from raising the issue.

Billeci v. United States, 290 F.2d 628

(9th Cir. 1961);

Fraker v. United States, 294 F.2d 859

(9th Cir. 1961);

Ramirez v. United States, 294 F.2d 277

(9th Cir. 1961);

O'Neal v. United States, 310 F.2d 175

(9th Cir. 1961).

Moreover, there is no allegation in appellants' brief or elsewhere that any of the Government's evidence other than Gollaher's statements themselves were the product of the questioned interrogation.

Although Rule 52(b) permits an appellate court to recognize plain error to which no objection was made below, this is within the discretion of the court, which here should not be exercised in appellants' favor.





(9th Cir. 1962).

B. THE PROCEEDINGS BELOW DID NOT DEPRIVE APPELLANTS OF THEIR RIGHTS NOT TO BE TWICE PUNISHED OR TWICE PLACED IN JEOPARDY ON ACCOUNT OF THE SAME OFFENSE, OR OF THEIR RIGHT NOT TO BE CRUELLY OR UNUSUALLY PUNISHED.

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Appellants argue that, prior to trial on the indictment herein, they were as licensed general contractors engaged in the development of a tract of about 400 homes in the area of San Jose, California (Appellants' Brief, 45-46). They state that the VA on December 23, 1965 so acted as to deprive them of a livelihood, in that the VA then advised appellants that the VA would refuse to appriase this project, which meant that VA loan guarantees would not be available to purchasers of homes in the project. As a result of this action, appellants contend, they sustained a loss of nearly \$1,500,000 on the project. Appellants claim that this action by the VA constituted the imposition of a criminal penalty for the acts alleged in the indictment, and that the trial below subjected appellants to double jeopardy and double punishment.

The question arises, whether appellants' suspension by the VA can be deemed a criminal sanction. The appellee submits that the suspension was clearly civil and remedial, not criminal, in character.

It should be noted that the VA acted pursuant to authority



granted the Administrator of Veterans Affairs in Title 38, United States Code, Section 1804(b), which provides in substance that the Administrator may refuse to appraise any dwelling or housing project owned, sponsored, or to be constructed by a person identified with housing previously sold to veterans as to which it is ascertained that the methods or practices pursued in relation to the marketing of such properties were unfair or unduly prejudicial to veteran purchasers.

The courts have made a clear distinction between those civil, remedial actions which are brought primarily to protect the Government from financial loss, and actions intended to authorize criminal punishment to vindicate public justice. Only the latter subject a defendant to "jeopardy" in the constitutional sense.

Helvering v. Mitchell, 303 U.S. 391, 399 (1937);

United States ex rel. Marquis v. Hess,

317 U.S. 537, 549 (1942).

The Supreme Court stated in the Helvering case:

"Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense. The question for decision is thus whether . . . the statute in question . . . imposes a criminal sanction. That question is one of statutory construction." 303 U.S. at 399.





A reading of Title 38, United States Code, Section 1804(b), reveals that it does not impose a criminal sanction but merely authorizes a remedial sanction, in order to protect veteran purchasers from unfair and overreaching practices by developers.

The cases cited by appellants in support of their position do not support the contention that the VA's action was such as to impose a criminal sanction. In re Nielsen, 131 U.S. 176 (1889) is a double jeopardy case wherein the Supreme Court held that a conviction for unlawful cohabitation bars a subsequent adultery prosecution: both actions clearly imposed a criminal sanction. In re Snow, 120 U.S. 275 (1887) holds that three charges for unlawful cohabitation are deemed to constitute but one crime. Grafton v. United States, 206 U.S. 333 (1907) deals with double jeopardy as then applied in the military courts.

Appellants urge that they have been deprived of their livelihood by the VA action, and that this in itself constitutes punishment. Ex Parte Garland, 71 U.S. 333 (1866) and Cummings v. Missouri, 71 U.S. 277 (1866) deal with bills of attainder and ex post facto laws, not with double jeopardy. Moreover, the assumption that appellants were excluded from a profession or avocation of life is clearly fallacious. There is no allegation that the VA did, or had the power to, affect appellants' licenses as general contractors, and general contracting was their business. It cannot fairly be said that Gollaher was deprived of his livelihood simply because the VA refused to appraise one of his housing developments. Gollaher, moreover, had no vested right to have his property appraised by



the VA (See 38 U.S.C. §1804(b)).

C. THE RECORD HEREIN DOES NOT  
SHOW THAT THE GOVERNMENT'S  
WITNESSES AT THE TRIAL BELOW,  
OR ANY OF THEM, WERE COERCED  
INTO TESTIFYING UNFAVORABLY  
TO APPELLANTS.

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Appellants contend that three of the Government's trial witnesses, Evelyn Barbee, Lloyd McDaniel and Charles Barboza, were "coerced" by Government counsel and agents of the FBI at the time of their appearances before the grand jury. From this they reason that the trial testimony of these witnesses should have been excluded.

To begin with, the statements made by these witnesses to the grand jury, which are alleged to be the product of "coercion", were used at trial by the defense in an effort to impeach the witnesses. Having introduced these statements at trial, appellants are now seeking to show they were the products of coercion, an obviously improper procedure. There is no allegation that the testimony given months later at trial was itself coerced, although appellants do argue that if the witnesses had changed their grand jury testimony at trial they would have been subject to prosecution for perjury.

In any case, no coercion of these witnesses at any time is shown by the record. The alleged instances of coercion cited by appellants appear to be the following, all of which occurred at or before the time of the grand jury testimony in 1965 and 1966





(Appellants' Brief, 17-27).

1. FBI agents unsuccessfully sought an interview with Mrs. Barbee late in 1964 and in January of 1965, on several occasions;

2. Mrs. Barbee was told by Government counsel that her assistance, if any, to the Government would be made known to the court;

3. Mrs. Barbee conferred with the U. S. Attorney;

4. Charles Barboza was warned of the penalties of perjury;

5. Lloyd McDaniel was questioned by the FBI and gave a statement (which was never used at the trial);

6. Lloyd McDaniel changed his testimony before the grand jury, implicating Gollaher, after he was told by Government counsel that in his opinion McDaniel had previously lied and after Government counsel raised the possibility that his relatives, including his wife and his infirm parents, might be called to testify before the grand jury.

The foregoing reflects no deprivation of these witnesses' rights. The Government has already shown (See part 1 of Argument, supra) that a prospective defendant may properly be subpoenaed to testify before the grand jury. The supposed "coercion" of these witnesses was nothing more than a fair, even though persistent, effort by the grand jury to elucidate from reluctant witnesses the truth about Gollaher's activities.

The case law does not support appellants here. In the case



of United States v. Wolfe, 307 F.2d 798 (7th Cir. 1962), the appellant contended for the first time on appeal that the Government's principal trial witness, Ballinger, was a victim of "inhumane coercion" by investigating officials when she gave a statement incriminating defendant subsequent to her arrest. It appears that Ballinger testified that she was in custody for three days following her arrest, during which time she had no food or drink. The Court of Appeals nevertheless decided that no deprivation of federal constitutional rights had been shown.

In the present case none of the supposedly "coerced" witnesses, Barbee, Barboza and McDaniel, was ever in custody or subjected to any physical restraint or privation or maltreatment whatever. None of their rights was abridged.

The case of Napue v. Illinois, 360 U.S. 264 (1959), cited by appellants in support of their position that the use of Barbee, Barboza and McDaniel as witnesses violated their constitutional rights, is not in point. That was a case where the prosecutor failed to correct testimony which he knew to be false, and such failure was held a deprivation of due process; here, there is no suggestion that Government counsel knew any of the testimony at trial to be false.

Other cases cited by appellants in support of their position are equally inapplicable: United States v. Flynn, 130 F. Supp. 412 (SDNY 1955) was a case, like Napue, where not coercion but false trial testimony was at issue; Turner v. Pennsylvania, 338 U.S. 62 (1949) involved admissibility not of trial or grand jury testimony





but of extrajudicial statements made by defendant's co-principals during a period of custody; Mesarosh v. United States, 352 U.S. 1 (1956) was a case where the Government asked a remand because it suspected that false testimony was given at trial by a Government witness.

If this Court should accept appellants' position, the effect would be to exclude the Government from presenting at trial the testimony of any witness who had previously been persuaded before the grand jury to change a false story and tell the truth. Such methods of persuasion, including a reminder of the perjury statute and even a threat to ask the court to compel answers, are a useful and necessary tool of the prosecutor.

D. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE THAT SOME OF THE HOME SALES, INFECTED BY AND RESULTING FROM FALSE STATEMENTS MADE BY APPELLANTS, RESULTED IN FINANCIAL LOSS TO THE GOVERNMENT AND/OR TO SOME OF THE PURPORTED PURCHASERS.

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At the trial, Government counsel elicited evidence that some of the VA transactions, whereby Gollaher used the purported purchaser's VA entitlements to put other persons into possession of homes, resulted in loss to the purported purchasers, who were required to pay deficiencies after foreclosure because they were the purchasers of record [R. T. 588, 710-712]. This evidence was admitted, and its admission was altogether proper.



It is of course correct that the Government need not show financial loss to the Government, or to others, as a necessary element of the crime of violating Title 18, United States Code, Sections 1001 and 1010. And appellants argue from this, with no citation of authority whatever, that the Government should not present evidence of financial loss because of its inherently prejudicial character.

This question was considered by the Fourth Circuit Court of Appeals in the case of Gormley v. United States, 167 F.2d 454 (4th Cir. 1948). There, the defendant was accused of falsifying war assets sales documents to show that defendant was entitled to delivery of more goods than he had paid for. The Government presented evidence that, at the time defendant paid for the goods originally contracted for, his check given in payment exceeded his bank balance and that the check was subsequently dishonored. The admission of this evidence was upheld. The Court stated (167 F.2d at 458):

"It is alleged that this evidence was irrelevant to the actual crime charged and tended to prejudice the minds of the jurors against the defendant. We think this evidence was admissible in order to give the jury a full picture of the whole transaction."

The check given the Government in Gormley was certainly more remote from the fraud alleged than are the deficiency losses in the present case; the latter were the natural and even necessary consequences of a fraud which put substandard credit risks in possession





of homes they could not pay for, while the Government was duped into believing that other persons, veterans, such as Richard Hall Holt, were occupying and paying for the homes.

The jury below was entitled to know the whole story of Gollaher's false statements, including their detrimental effects upon the Government and upon the purchasers of record of the homes, who had sold their VA entitlements in response to Gollaher's blandishments and were ultimately left liable for the deficiencies.

E. THE TRIAL COURT DID NOT ERR IN  
REFUSING TO PERMIT INSPECTION  
BY DEFENSE COUNSEL OF CERTAIN  
FHA DOCUMENTS AND OF THE TRAN-  
SCRIPT OF GRAND JURY TESTIMONY  
GIVEN BY PERSONS WHO WERE NOT  
CALLED AS WITNESSES AT THE TRIAL.

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Appellants allege that they were unlawfully deprived of an opportunity to review governmental intra-agency communications pertaining to the FHA. Appellants do not contend that they were entitled to discover this material under Rule 16 of the Federal Rules of Criminal Procedure; indeed Rule 16(b) specifically provides that discovery or inspection of reports, memoranda, or other internal government documents made in connection with the investigation or prosecution of the case is not authorized. Nor do appellants contend that these documents are available to them under Title 18, United States Code, Section 3500.

If the production of these documents is required by Brady v. Maryland, 373 U.S. 83 (1963), it is clear that the court did not err



in directing the prosecutor to make a selection of those documents, and ordering the documents sealed for this Court's inspection.

In the case of Shayne v. United States, 255 F.2d 739 (9th Cir. 1958), this Court held it was not an abuse of discretion for a trial court to refuse a request for inspection of documents in a conspiracy prosecution charging false statements to the FHA.

In any case, these documents are now before this Court (Exhibit 38) for review. The Government submits that the documents do not contain any evidence favorable to appellants and that therefore no prejudice can be shown in a failure to disclose them at trial.

Insofar as the Government's refusal to produce the minutes of Grand Jury testimony by George Knapton and Gene Morgan is concerned, the defense was clearly not entitled to those minutes. Neither Knapton nor Morgan was called as a Government witness. Only the Grand Jury testimony of Government witnesses is available under the holding of Dennis v. United States, 384 U.S. 855 (1966), and then only upon appropriate showing of need. The purpose of the Dennis rule is to allow effective cross-examination by defense counsel of witnesses actually called by the Government. The Supreme Court stated in Dennis:

"Because petitioners were entitled to examine the grand jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross-examination, we reverse the judgment below. . . ." 384 U.S. at 875.





Thus the Dennis rule does not apply.

Moreover, the witnesses Knapton and Morgan were fully available to be called as witnesses or interviewed by the defense, and the defense chose not to call them. Under the circumstances it is clear that there is no prejudice.

F. THE TRIAL COURT DID NOT ERR IN REFUSING TO FIND AS A MATTER OF LAW THAT COUNTS FOUR AND SIX OF THE INDICTMENT FAILED TO ALLEGE A FALSE STATEMENT SUFFICIENT, IF PROVED, TO SUPPORT A CONVICTION FOR VIOLATION OF TITLE 18, UNITED STATES CODE, SECTION 1001.

---

Counts Four and Six of the indictment allege false statements made to the VA, in the form of statements that a deposit in the sum of \$25 had been received on account of the purchase price of two homes from two respective veteran purchasers (Richard Holt and Lloyd McDaniel), when such was not the case.

Both Holt and McDaniel testified that they had made these statements at Gollaher's instigation, and that the statements were false [R. T. 458-459, 709].

Appellants now contend that these two counts do not state a material fraud because the VA does not require a down payment. At the trial evidence came in that the payment of a \$25 deposit would not influence the VA to accept or reject an applicant for loan guarantee [R. T. 62-63].

The Ninth Circuit has already considered, in the case of



Brandow v. United States, 268 F.2d 559 (9th Cir. 1959) the contention that if the Government does not rely on a statement found to be false, the defendant is entitled to acquittal. In Brandow, the court quoted certain language from United States v. Quirk, 266 F.2d 26 (3rd Cir. 1959), a case wherein the defendant was accused of causing a lending institution to submit to the VA a false application for insurance. Because the application was rejected by the VA, appellant urged that the exercise of a Government function could not have been influenced by the admitted false statements and hence that the statements were not material. The Court stated:

"[W]e believe that the conduct Congress intended to prohibit by § 1001 was the wilful submission to federal agencies of false statements calculated to induce agency reliance or action, irrespective of whether actual favorable agency action was, for other reasons, impossible. We think the test is the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end as measured by collateral circumstances." 268 F.2d at 565. [Emphasis added]

In this case, the statement that \$25 deposits were made was certainly found by the jury to be intrinsically capable of attaining Gollaher's end of obtaining illegal loan guarantees by deceiving the VA into believing that good faith purchasers who could and would put up money were involved. This finding should not be disturbed





on appeal, since this Court must view the evidence at trial in the light most favorable to the Government.

Glasser v. United States, 315 U. S. 60 (1942);

Noto v. United States, 367 U. S. 290 (1961);

Stein v. United States, 327 F. 2d 825

(9th Cir. 1964), cert. denied 377 U.S. 970.

G. THE EVIDENCE IS SUFFICIENT TO  
SUSTAIN THE JUDGMENT OF CON-  
VICTION AGAINST APPELLANT  
GOLLAHER CONSTRUCTION, INC.

---

Gollaher Construction, Inc. was a corporation organized, along with two others, by Gollaher in 1961 to engage in the building business. It functioned as a business entity at least until November 1, 1966 [R. T. 991]. Gollaher was president of this corporation [R. T. 1082]. At his grand jury appearance, Gollaher testified that G & B Construction, Inc. and Design Homes, Inc. were subsidiaries of Gollaher Construction, Inc. [R. T. 1082]. At trial, however, Gollaher testified that Gollaher Construction, Inc. had nothing to do with the transactions charged in the indictment [R. T. 1085].

The record as a whole shows that Gollaher used the three corporations almost interchangeably. For example, employees of his performed services for Gollaher Construction, Inc. [R. T. 1086]. The check for \$300 payable to Holt Lumber Company for Richard Holt's veterans entitlement apparently went through the



Gollaher Construction, Inc. account [R. T. 1086-1087].

It seems patent that Gollaher Construction, Inc. was one of the instrumentalities by which Gollaher carried out the illegal transactions charged in Counts One through Six of the indictment. Basically, the theme runs throughout the record that all three of the corporations were no more than the three faces of Gollaher. Gollaher himself testified at the grand jury hearing that Gollaher Construction, Inc. was a parent corporation to the others; he may have meant, and the jury should be free to find, that in a non-technical sense he used Gollaher Construction, Inc. as a supervisory entity, giving through it the directions to Evelyn Barbee and other employees which underlie the indictment, and acting for it when he made his fraudulent propositions to Holt and McDaniel.

Once again, viewing the evidence most favorably to the Government, the jury's finding of guilty against Gollaher Construction, Inc. should not be disturbed.

Glasser v. United States, supra;

Noto v. United States, supra;

Stein v. United States, supra.

Moreover, Evelyn Barbee appears to have identified Gollaher Construction, Inc. as her employer, under the name "Gollaher Company" [R. T. 201]; Charles Barboza described Gollaher as owner and president of "the Gollaher Company", and Lloyd McDaniel also testified that he worked for the Gollaher Company [R. T. 702].





H. THE TRIAL COURT IN IMPOSING  
SENTENCE ON APPELLANTS DID  
NOT IMPROPERLY CONSIDER APPEL-  
LANTS' REFUSAL TO ADMIT GUILT  
AT THE TIME OF SENTENCING.

---

Appellants were sentenced on December 12, 1966. Prior to sentencing defense counsel, Mr. Earl Klein, made a statement requesting probation for Gollaher rather than imprisonment [R. T. 1475-1478]. The following colloquy then took place.

"THE COURT: Don't you feel that probation requires that some trust be placed in Mr. Gollaher?

"MR. KLEIN: Yes, and I believe he is worthy of that trust.

"THE COURT: Except that he already has lied to the court under oath and how can I believe him in other aspects?"

. . . . .

"THE COURT: I fail to see it, Mr. Klein, I'm sorry to say. Here is a man that still doesn't admit that he has violated the law. The first step toward rehabilitation is an admission of his faults, his willingness to start over and make amends."

. . . . .

"THE COURT: I was only mentioning it with regard to probation. I don't feel that probation is indicated under the circumstances."

[R. T. 1478-1485 passim.]



Thus, Gollaher refused to the end to acknowledge that he had not told the truth on the witness stand, and the court took this into account in refusing to grant him probation. This action is assigned as error by appellants.

The power of a trial court to suspend sentence and place a convicted defendant on probation is wholly within the trial court's discretion, and its exercise cannot be questioned on appeal.

Elder v. United States, 142 F.2d 199  
(9th Cir. 1944).

The trial court considered Gollaher's refusal to admit his fault solely in the course of its exercise of discretion whether to suspend sentence and grant probation.

On this exact point, the Tenth Circuit ruled in the case of Williams v. United States, 273 F.2d 469 (10th Cir. 1960). There the court held that the trial court had discretion to deny probation because of the defendant's continued assertion of his innocence on a charge of detaining and secreting mail. The Court of Appeals held:

"While the court's action in denying probation because of the defendant's continued assertion of his innocence may seem severe, the matter is one entirely for the trial court." (273 U.S. at 470.)

The action of the trial court in Thomas v. United States, 368 F.2d 941 (5th Cir. 1966), cited by appellants, is distinguishable from the present case. There, the trial court gave a longer





sentence of incarceration because of the defendant's continued assertion of innocence, and probation was not an issue.

Moreover, if the Williams and Thomas cases are in conflict, the Government urges this Court to adopt the rule in Williams as the better rule. Discretion over degrees of lawful sentencing belongs in the trial court, where the trial judge has had a chance to size up the moral attitudes and credibility of the defendant during trial.

I. THE TRIAL COURT DID NOT PRE-JUDICIALLY ERR IN OVERRULING OBJECTIONS TO QUESTIONS ASKED BY GOVERNMENT COUNSEL.

---

At trial, Government counsel cross-examined Gollaher. In the course of his cross-examination, he elicited from Gollaher the information that the latter subsequent to 1959 was associated with one James Tripp in the framing and construction of houses. The prosecutor then asked Gollaher:

"And you knew that Mr. Tripp was convicted in this court in 1965 for filing false statements to the FHA, didn't you?" [R. T. 1080].

At this point defense counsel interrupted, and the record shows that no answer was given. If an affirmative answer had been given and allowed to stand, it is probable that the resultant error would have been harmless in view of the other, overwhelming



evidence against Gollaher.

McRaye v. United States, 163 F.2d 868

(9th Cir. 1947);

Kowalchuk v. United States, 176 F.2d 873

(6th Cir. 1949);

United States v. McClenny, 346 F.2d 125

(4th Cir. 1965).

But the objectionable question was not only unanswered, it was stricken at once by the trial court [R. T. 1081-1082]. The court carefully told the jury that the association with Mr. Tripp had no bearing on guilt or innocence. Moreover, again, in instructing the jury, the court stated that a question stricken from the record should be disregarded [R. T. 1422]. In view of all the evidence against Gollaher, the question concerning James Tripp should be deemed not prejudicial.

Appellants contend that other questions asked by Government counsel, to which objection was made were "argumentative" and leading. A review of these questions (Appellant's Brief, pp. 56-57) reveals that they are not objectionable. Rather, they are forthright inquiries concerning Mrs. Barbee's knowledge of false statements in connection with the Gollaher organization's dealings with the VA and FHA.





## CONCLUSION

For the reasons stated above, the judgments of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael Heuer  
\_\_\_\_\_  
MICHAEL HEUER





NO. 21636 ✓

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

ANGEL MORA ZARAGOZA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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APPELLEE'S BRIEF

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

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**NOV 6 1967**

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APPELLEE'S BRIEF

---

I.

JURISDICTIONAL STATEMENT

On January 1, 1966, a six-count indictment was returned against appellant and Ernest Anthony Rivera by the Federal Grand Jury for the Southern District of California, Central Division [C. T. 2].<sup>1/</sup>

Counts Four, Five and Six charged that appellant and codefendant Rivera sold, transported, and concealed illegally imported marihuana. Appellant was convicted on Counts Four, Five and Six [C. T. 16].

Appellant filed a timely notice of appeal [C. T. 20].

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1/ C. T. refers to Clerk's Transcript.





The District Court had jurisdiction under Title 18, United States Code, Section 3231 and Title 21, United States Code, Section 176a. This Court has jurisdiction under Title 28, United States Code, Sections 1291 and 1294.

## II.

### STATUTE INVOLVED

Title 21, United States Code, Section 176a provides:

"Notwithstanding any other provisions of law, whoever, knowingly, with intent to defraud the United States, . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, . . . shall be imprisoned not less than five years or more than 20 years, and in addition, may be fined not more than \$20,000 . . .

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury. "



### III.

#### STATEMENT OF THE CASE

Appellant was indicted on January 12, 1966, and charged with the concealment and sale of marihuana, as well as a failure to obtain a written order form for the transfer of marihuana [C. T. 2-7].

Appellant was arraigned on February 14, 1966, at which time he entered a plea of not guilty to Counts Four, Five and Six [C. T. 9].

Trial by jury commenced on February 15, 1965, before the Honorable Francis C. Whelan, United States District Judge [C. T. 11]. Appellant was found guilty on Counts Four, Five and Six on February 21, 1966 [C. T. 15].

Appellant filed a notice of appeal on May 2, 1966 [C. T. 20].

### IV.

#### STATEMENT OF THE FACTS

On December 29, 1965, codefendant Rivera sold marihuana to Federal Bureau of Narcotics Agent William Turnbou [R. T. 106].<sup>2/</sup> Prior to the actual exchange of money for marihuana on that date, Agent Turnbou and codefendant Rivera drove to the vicinity of appellant's home at 3711 Hellman Street, Los Angeles [R. T. 103-104]. Rivera left the vehicle and entered appellant's house

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<sup>2/</sup> R. T. refers to Reporter's Transcript.





moments later [R. T. 261, 305, 550]. Rivera left \$500 of official advance funds, given to him earlier by Agent Turnbou [R. T. 105], at Zaragoza's house; Zaragoza placed this money under some cotton beneath a Christmas tree [R. T. 196-7, 309, 552-3].

A few minutes after his arrival, Rivera left appellant's apartment with approximately five kilograms of marihuana [R. T. 187, 265, 306, 77]. Rivera was arrested moments later, after he had delivered the marihuana to Agent Turnbou [R. T. 108]. A third man, Mr. Chavez, was observed entering the apartment of appellant [R. T. 264-5]. Chavez left the apartment prior to Rivera's departure, and was stopped by narcotics agents a few blocks away. At that time, Chavez had in his possession a \$10 bill, which had been given to him by Zaragoza; the bill was one of the previously recorded bills given to Rivera by Agent Turnbou [R. T. 265-6, 553, 556].

Approximately one-half hour after Rivera's departure from appellant's home, Federal Bureau of Narcotics agents arrested appellant at his home and searched his house [R. T. 193, 195]. \$490 in official advance funds were found under Zaragoza's Christmas tree [R. T. 308].

At the time of his arrest and after appellant had been advised of his constitutional rights and acknowledged that he understood them, appellant said to Agent Durel, "You got the money, that's all there is" [R. T. 197-8, 309].

A search of appellant's person uncovered a marihuana



cigarette in his pocket [R. T. 195].

V.

QUESTIONS PRESENTED

1. In the absence of a motion by either defendant, was it plain error not to require separate trials?
2. Should a judgment of acquittal have been granted based upon an informant's assertion of the Fifth Amendment privilege, where he was called as a witness for the codefendant?
3. Was it plain error not to instruct the jury as to the entrapment of appellant?
4. Does the record disclose an unreasonable search and seizure?
5. Is the presumption established by Title 18, United States Code, Section 176a, constitutional?





## VI

### ARGUMENT

#### A. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO GRANT A SEVERANCE.

---

Joinder of appellant and co-defendant Rivera in the same indictment was proper, since they participated in the same transactions and series of transactions. Fed. R. Cr. Proc., Rules 7-8; Williamson v. United States, 310 F.2d 192 (9th Cir. 1962); United States v. Hoffa, 349 F.2d 42 (6th Cir. 1965); Nelson v. United States, 375 F.2d 740 (9th Cir. 1967).

Since joinder in the indictment and for trial was proper, appellant had the burden of showing prejudice resulting from the joinder in order to invoke the trial court's discretion and obtain a severance. In the absence of an affirmative showing that prejudice will result so as to deprive defendant of a fundamentally fair trial, a motion for severance should be denied. Sagansky v. United States, 358 F.2d 195 (2nd Cir. 1966); cf. Williamson v. United States, 310 F.2d 192 (9th Cir. 1966).

A general, unsupported allegation of prejudice is not sufficient to warrant severance of counts that are properly joined. United States v. Haun, 218 F.Supp. 923 (S. D. N. Y. 1963).

The right to a severance rests with the sound discretion of the trial court. Pointer v. United States, 151 U.S. 396, 400 (1894); United States v. Garrison, 265 F.Supp. 112 (1967); United States v. Hoffa, 349 F.2d 43 (6th Cir. 1965). Absent an affirmative showing



of an abuse of discretion, refusal to sever is not assignable as error. Stilson v. United States, 250 U.S. 583 (1919); Mendez v. United States, 349 F.2d 650 (9th Cir. 1965), cert. denied, 384 U.S. 1015 (1966). A fortiori, the trial court is not required to grant a severance, sua sponte, absent a showing of prejudice, as distinguished from a conclusory statement that prejudice resulted. Russell v. United States, 288 F.2d 520 (9th Cir. 1961), cert. denied, 371 U.S. 926 (1962).

Additionally, since appellant did not move for a severance below, he cannot present his claim that he was prejudiced by the joint trial for the first time on appeal. Cardarella v. United States, 351 F.2d 443 (8th Cir. 1965); United States v. Perk, 210 F.2d 457 (2nd Cir. 1954).

Noticeably, appellant made no claim of prejudice at any time in the trial court. Counsel for the co-defendant adverted to the possibility of a severance to enable the co-defendant to waive a jury [R. T. 13]. The jury was not waived by either defendant, nor was severance mentioned again.

Appellant makes no showing of prejudice, except that evidence of the December 22nd transaction was introduced at the trial against defendant Rivera. The court instructed the jury twice on this point [R. T. 444, 797-798]. There is no reason to presume that the jury was incapable of performing their sworn duty to consider each defendant separately and to adhere to the court's instructions, especially in view of the relatively simple facts of the case. See Peek v. United States, 321 F.2d 934 (9th Cir. 1963),





cert. denied, 376 U.S. 954 (1963); Gorin v. United States, 313 F.2d 641 (1st Cir. 1963), cert. denied, 374 U.S. 829 (1963); United States v. Hanlin, 29 F.R.D. 481 (D.C. Mo. 1962).

Appropriate instructions can obviate any possible confusion between the two defendants to be tried, and confine the jury's consideration to evidence produced as to each particular defendant. Spencer v. Texas, 385 U.S. 554 (1967); Delli Paoli v. United States, 352 U.S. 232, 242 (1957).

B. THE DENIAL OF CO-DEFENDANT'S  
MOTION FOR JUDGMENT OF ACQUITTAL  
CANNOT BE ASSERTED AS PREJUDICIAL  
ERROR AS TO APPELLANT.

---

Counsel for Rivera moved for a judgment of acquittal at the close of the case on the ground that co-defendant's witness, the Government informant, Greathouse, asserted the Fifth Amendment privilege. No such motion was made by appellant. The alleged prejudice to Rivera from the informant's conduct ostensibly affected Rivera's entrapment defense [R. T. 824-825]. Since Appellant did not assert, and clearly could not have asserted, the defense of entrapment for the reasons discussed below, Greathouse's assertion of the privilege was entirely immaterial to appellant's defense.

Additionally, the only questions not answered ultimately by the informant pertained to his consent to Agent Turnbou's monitoring the call and his discussion of narcotics with Turnbou. Those



answers were irrelevant to the entrapment defense of either defendant, and clearly could have incriminated the witness.

Moreover, the privilege against self-incrimination has been interpreted liberally "in favor of the right it was intended to secure." Hoffman v. United States, 341 U.S. 479, 486 (1951). Unless it is " 'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer(s) cannot possibly have such tendency' to incriminate", the claim should be upheld. 341 U.S. at 488.

C. THE COURT PROPERLY INSTRUCTED  
THE JURY REGARDING ENTRAPMENT.

---

That a defendant who denies committing the acts charged is not entitled to an instruction on the defense of entrapment is settled in this Circuit. Garibza-Garcia v. United States, 362 F.2d 509 (9th Cir. 1966); Ortega-Romero v. United States, 362 F.2d 804 (9th Cir. 1966); Ortega v. United States, 348 F.2d 874 (9th Cir. 1965); Dunbar v. United States, 342 F.2d 979 (9th Cir. 1965).

Appellant denied having committed the acts which constitute the crime [R. T. 769]. He failed to object to the instruction [R. T. 824], or to request an instruction [R. T. 375]. An appellant may not sit idly by in the face of an alleged error, assuming arguendo that an error was committed, and later take advantage of an error he helped create. United States v. Grosso, 358 F.2d 154 (4th Cir. 1966).





Appellant chose not to assert entrapment as a defense, and told the trial court specifically that no such plea would be offered [R. T. 399]. Neither evidence, argument, nor an admission that appellant committed the acts alleged were offered by the appellant at the trial. He cannot litigate that issue for the first time on appeal. Holt v. United States, 303 F.2d 791 (9th Cir. 1962); Smith v. United States, 287 F.2d 270 (9th Cir. 1961), cert. denied, 366 U.S. 946 (1960); Johnston v. United States, 254 F.2d 239 (8th Cir. 1958).

Appellant cannot rely upon his co-defendant's defense of entrapment, since appellant neither admitted the acts in question nor offered evidence that he was illegally entrapped. In fact, there is no evidence in the record to indicate that appellant had any contact with a Government agent or the informant prior to the arrest. In this connection, it is noteworthy that appellant cites no authority for his novel assertion that the entrapment defense raised by his co-defendant applies automatically to him.

D. THE RULE OF EVIDENCE CREATED  
BY STATUTE AS TO THE ORIGIN OF  
MARIHUANA POSSESSED IS CONSTITUTIONAL.

---

Title 21, United States Code, §176(a) provides in pertinent part that:

"Whenever . . . the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence



to authorize conviction, unless the defendant explains his possession to the satisfaction of the jury. "

This court has held there is no merit in the contention that this presumption is unconstitutional. Jefferson v. United States, 340 F.2d 194, 199 (9th Cir. 1965). The presumption's validity has been affirmed repeatedly by this and other Circuit Courts. E. g. , Caudillo v. United States, 253 F.2d 513 (9th Cir. 1958), cert. denied, sub nom. , Romero v. United States, 357 U.S. 931 (1958); Hunter v. United States, 339 F.2d 425 (9th Cir. 1964); Borne v. United States, 332 F.2d 565 (9th Cir. 1964); Robinson v. United States, 327 F.2d 618 (8th Cir. 1964); Charles Toy v. United States, 266 Fed. 326 (2nd Cir. 1920).

E. THE SEARCH OF APPELLANT'S  
APARTMENT AND THE RESULTING  
SEIZURE OF EVIDENCE WERE  
INCIDENT TO A LAWFUL ARREST  
AND THEREFORE CONSTITUTIONAL.

---

Having failed to timely raise the issue by a motion to suppress the seized money or to object to its admission into evidence at the trial, appellant cannot now assert error on this ground. Woo Lai Chun v. United States, 274 F.2d 708 (9th Cir. 1960); United States v. Monticallos, 349 F.2d 82 (2nd Cir. 1965).

In any event, the ambit of a constitutionally permissible search and seizure includes a search and seizure incident to a





lawful arrest. Beck v. Ohio, 379 U.S. 89 (1964); United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947); Reed v. United States, 364 F.2d 630 (9th Cir. 1966).

The search and seizure here challenged was incident to an arrest; thus, the question to be resolved is whether the arrest was lawful. The Supreme Court has said:

"The lawfulness of the arrest without warrant . . . must be based upon probable cause, which exists where 'the facts and circumstances within their [the officer's], knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

Ker v. California, 374 U.S. 23, 35 (1964), quoting Brinegar v. United States, 338 U.S. 160, 175-176 (1949), and Carroll v. United States, 267 U.S. 132, 162 (1925).

The record discloses that the officers involved had probable cause to arrest Zaragoza on the following facts: Rivera was observed entering Zaragoza's house with \$500 in previously recorded bills and coming out with five kilograms of marihuana [R. T. 77, 187, 265, 306]; prior to Rivera's exit, Chavez left Zaragoza's apartment and was found to have a \$10 bill which had been given to him by Zaragoza; this bill was one of the previously recorded bills given to Rivera by Agent Turnbou [R. T. 265-266, 553, 556].



VII

CONCLUSION

For the foregoing reasons, it is submitted that the conviction should be affirmed.

Respectfully submitted,

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CRAIG B. JORGENSEN,  
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Attorneys for Appellee,  
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## CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen

CRAIG B. JORGENSEN



N O. 2 1 6 3 7

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LESLIE EUGENE LONGACRE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

---

WM. MATTHEW BYRNE, JR.,  
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ROBERT L. BROSIO,  
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FILED

JAN 26 1968

WM. B. LUCK, CLERK

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N O. 2 1 6 3 7

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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N O. 2 1 6 3 7  
IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

LESLIE EUGENE LONGACRE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

---

APPELLEE'S BRIEF

---

I

JURISDICTIONAL STATEMENT

On November 23, 1965 the Federal Grand Jury for the Central Division of the Southern District of California returned an indictment in one count charging appellant with violation of Title 18, United States Code, Section 2113(a). The indictment alleged that appellant, by force and violence and by intimidation, knowingly and wilfully attempted to take from Bette Johnstone, teller, money belonging to the Bank of America, Clarendon Pacific Branch, Huntington Park, California [CT 2]. <sup>1/</sup>

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<sup>1/</sup> "C. T. " refers to Clerk's Transcript.





On November 29, 1965 defendant was arraigned and plead not guilty [CT 3].

On December 13, 1965 defendant appeared before the Honorable Peirson M. Hall, United States District Judge and waived trial by jury [CT 10]. A court trial before Judge Hall was begun on December 14, 1965 and the defendant was found guilty as charged on that day [CT 9].

On January 10, 1966 the defendant was adjudged convicted upon his plea of not guilty and verdict of guilty and sentenced to the custody of the Attorney General for a period of 20 years [CT 11]. The Court specified that the prisoner may become eligible for parole at such time as the Board of Parole may determine, pursuant to Title 18, United States Code, Section 4208(a)(2). On January 15, 1966 defendant filed a timely notice of appeal.

Jurisdiction of the District Court was based on Title 18, United States Code, Sections 2113 and 3231. Jurisdiction of this Court is based on Title 28, United States Code, Section 1294(1) and Rule 37(a) of the Federal Rules of Criminal Procedure.

## II

### STATUTE INVOLVED

Title 18, United States Code, Section 2113(a), provides in pertinent part as follows:

"Whoever, by force and violence, or by intimidation, . . . attempts to take, from the person



or presence of another any property or money or  
any other thing of value belonging to, or in the care,  
custody, control, management, or possession of,  
any bank, or any savings and loan association . . . ."

shall be guilty of an offense.

### III

#### QUESTIONS PRESENTED

1. Whether the appellant was properly charged with violation of Title 18, United States Code, Section 2113(a), attempted bank robbery.
2. Whether the lawful sentence imposed is a cruel and unusual punishment.
3. Whether the attempt provision of Section 2113(a) is void for vagueness.

### IV

#### STATEMENT OF THE FACTS

Shortly before 1:00 p.m. on November 10, 1965 appellant entered the Bank of America, Clarendon Pacific Branch, Huntington Park, California. He stepped up to Teller Bette Johnstone's window, laid a brown envelope on the counter and said, "This is a holdup" [R. T. 8]. <sup>2/</sup> Miss Johnstone testified that she is quite sure

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<sup>2/</sup> "R. T. " refers to Reporter's Transcript.





the defendant did not say "What is the holdup" [R. T. 13].

The teller immediately ran to the next teller and screamed "Joe", directing her scream to bank operations officer, Joe Joslyn [R. T. 8-9].

A customer heard the teller's shouts and saw the appellant start out the door [R. T. 15]. He and the operations officer followed the defendant outside the bank. The defendant stopped and pointed a gun at them which resembled Government's Exhibit Number One [R. T. 17, 18, 33]. The defendant turned and ran down an alley, down another street, and was finally captured by the pursuing customer [R. T. 19-20]. During the chase the defendant paused at his car which was parked nearby occupied by his wife [R. T. 57]. A toy gun, Government's Exhibit Number One, had been on the floorboard of the defendant's automobile [R. T. 50].

## V

### ARGUMENT

- A. THE APPELLANT WAS PROPERLY  
CHARGED WITH VIOLATION OF TITLE  
18, UNITED STATES CODE, SECTION  
2113(a), ATTEMPTED BANK ROBBERY.
- 

Appellant apparently claims that the appellant should have been charged with entering a bank with intent to commit a felony, rather than attempted bank robbery. Nowhere in appellant's brief is there support for such a contention. The evidence produced by the prosecution at trial clearly established the appellant's guilt of



the charged offense; the appellant does not claim the evidence to be legally insufficient. Prince v. United States, 352 U.S. 322 (1956), cited by appellant, only stands for the proposition that the unlawful entry offense merges with a completed bank robbery and a defendant cannot be sentenced on both charges. The opinion cannot be cited for the proposition that attempted bank robbery does not constitute an offense. Roberts v. United States, 331 F.2d 502 (1964) (Appellant's Brief, page 3), held only that Title 18, United States Code, Section 495 does not make it an offense to attempt to utter and publish, which it does not, and that certain indictment language did not charge an offense under Title 18, United States Code, Section 472. The case is inapplicable both to the statute and the case under consideration herein.

**B. THE SENTENCE IMPOSED ON APPELLANT IS WITHIN THE LIMITS SET BY THE STATUTE AND DOES NOT CONSTITUTE A CRUEL AND UNUSUAL PUNISHMENT.**

---

The appellant received a sentence of twenty years under Section 2113(a) and 4208(a)(2) thereby allowing full discretion to the Federal parole authorities in the matter of the length of time the appellant would serve in confinement. In view of all the facts before the trial court, including the appellant's prior record [R. T. 51 and 80] the sentence cannot be considered "cruel and unusual". Since the sentence does not exceed the maximum possible sentence under Section 2113(a), it is not open to attack as an illegal sentence.





United States v. Cohen, 177 F.2d 523, 525 (2nd Cir. 1949), cert. denied 70 S. Ct. 568.

Appellant argues, without any supporting authority, that it is illegal that an attempt should carry with it the same possible maximum sentence as the completed offense of bank robbery. Such a contention is supported neither by logic nor by the cases. The mere fact that circumstances prevent a criminal from carrying out his plans in no way reduces his culpability or the gravity of the offense.

C. THE ATTEMPT PROVISION OF  
SECTION 2113(a) IS NOT VOID FOR  
VAGUENESS.

---

The final alleged error which may be sifted from appellant's brief is that the attempt provision of Section 2113(a) is void for vagueness. While there is no general attempt statute in the United States Code statutes setting forth attempts as a separate offense, attempt violations are common to both state and federal law. The standard definition of an attempt is well stated in Black's Law Dictionary (4th Edition, 1951).

Attempt. In Criminal Law "An effort or endeavor to accomplish a crime amounting to more than mere preparation or planning for it, which if not prevented would have resulted in the full consummation of the act attempted, but which, in fact, does not bring to pass the party's ultimate design."

The statute in question only limits the standard definition by



the provision that the attempt involve force and violence, or intimidation.

### CONCLUSION

For the reasons herein stated, the appellant's conviction should be affirmed.

Respectfully submitted,

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Chief, Criminal Division,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael D. Nasatir  
\_\_\_\_\_  
MICHAEL D. NASATIR



No. 21638 ✓

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

In the Matter of

HUBBARD'S INC., a New Mexico corporation, together  
with its wholly owned subsidiaries, RANKINS DEPART-  
MENT STORES, INC., a California corporation, and  
WEILL'S INC., a California corporation,  
Bankrupt.

---

APPELLANT'S OPENING BRIEF.

---

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WM. B. LUCK, CLERK

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No. 21638

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with its wholly owned subsidiaries, RANKINS DEPART-  
MENT STORES, INC., a California corporation, and  
WEILL'S INC., a California corporation,

Bankrupt.

---

## APPELLANT'S OPENING BRIEF.

---

### Statement of Facts.

The facts of this case have been stipulated between the parties and that stipulation dated and filed August 17, 1965, has been submitted and is listed on the Index as Page 27 on this appeal.

Reference is made specifically to the Concession License Agreement dated February 2, 1960, and in particular to paragraphs 5, 7, 11, 12, 13, 16, and 17. They are further set out herein to wit:

#### "CONCESSION FEE

5. In consideration of said license and privilege herein granted. Concessionee shall pay as a concessions fee each term year a sum equal to ten per cent (10%) of its net cash sales and twelve per cent (12%) of its net charge sales made in and from the departments. In addition, Concessioner

will charge Concessionee its pro rata share of S & H Green Stamps issued monthly, the total of which shall not be in excess of two per cent (2%) of net sales.”

#### “REMITTANCES

7. Concessionee's sales shall be turned over to Concessioner who shall remit for same in the following manner: On Wednesday of each week for all net sales, cash and charge, made during the preceding calendar week ending on Saturday. From the remittances, Concessioner shall deduct the Concession Fee provided for hereinabove, together with any and all incidental expenses, if any, authorized by Concessionee and which may have been paid by Concessioner for or on Concessionee's account during the entire preceding calendar week. In the event this agreement is terminated by lapse of time or otherwise, Concessioner shall make full settlement at once, for all sales, cash and charge, made by Concessionee, up to and including the final day's sales in Concessionee's departments.”

#### “ACCOUNTING

11. Concessioner shall keep a true and correct account of all monies received, growing out of Concessionee's authorization and shall exhibit same to Concessionee or its representative upon reasonable request made. Concessionee shall keep a true and correct account of all sales and Concessioner shall, at reasonable times, have access to said accounts. Both parties hereto shall have the right to examine not only the books of account, but also all sales slips and other records pertaining thereto.”

#### “PAYROLL

12. Concessionee shall keep its own payroll records, and when approved by it, shall present same to Concessioner, who shall pay same, with the exception of the manager's salary, out of the monies in Concessioner's hands which are due Concessionee, and shall be deducted therefrom when making the remittances as provided in paragraph 7 hereinabove.”

#### “PURCHASING

13. Concessionee shall have exclusive charge of purchasing all merchandise for its departments, and all said merchandise shall be purchased in the name of and upon the credit of Concessionee and paid for directly by it.

#### “TRUST FUND

16. All sales, cash and charge, shall be made in the name of Concessioner and shall be recorded by Concessioner at its expense. All monies received by Concessionee's employees, representing proceeds from said sales, shall immediately be turned over to Concessioner who shall hold same in absolute trust for Concessionee; and, though commingled with other funds of Concessioner's, same shall nevertheless be and remain in trust for Concessionee until paid Concessionee in accordance with the provisions of paragraph #7 hereinabove.”

#### “CHARGE SALES GUARANTEE

17. All charge sales made by Concessionee shall be submitted to Concessioner for approval which shall not be unreasonably withheld. Concessioner



shall act as Concessionee's agent in collecting and recording said charge sales and shall bear all expenses incident thereto. Concessioner guarantees the payment of all charge sales made by Concessionee and approved by Concessioner."

The Wohl Shoe Company which is also known as Wetherby Kayser Shoe Company filed an Application to Reclaim proceeds of accounts receivable arising out of the sales of shoes and related items made by Wetherby-Kayser Shoe Company also known as Wohl Shoe company while it was a concessionee in a Department store operated by Rankin Department Stores, Inc. which is a subsidiary of Hubbard's, a New Mexico Corporation, and which said Department store was located in California.

An order of the Referee was entered in April 22, 1966, denying the relief sought by Wohl Shoe Company. This order was reviewed by Wohl Shoe Company, and an order affirming the Referee's order was entered and filed on September 23, 1966.

### **Summary of Argument.**

The Referee and the Judge found that there was no trust relationship between the parties, whereas the agreements state that the relationship is one of the creation of a trust and not a creditor-debtor relationship as the Court found.



## ARGUMENT.

### A Trust Relationship Was Created Between Wohl Shoe Company and Rankin's by the Terms of the Agreement Existing Between Them.

The paragraph of the Concession Lease Agreement quoted in The Stipulation of Facts clearly establishes a trust relationship between Rankin's, as Trustee, and Wohl Shoe Company, as Beneficiary. The various state laws and their interpretation govern the decision of a federal court regarding what property passes to the Trustee of a bankrupt estate.

*Riverside State Bank v. Ernest*, 199 F. 2d 874.

The proceeds of the trust subject to the Trust Agreement, are trust funds held for the benefit of Wohl Shoe Company and all who hold such proceeds are voluntary or involuntary trustees of same as the beneficial interest in these proceeds from the sale of the shoes was never transferred from Wohl Shoe Company, nor was it ever intended.

California Civil Code §§ 2216, 2217, 2220, 2223, 2224;

*Bainbridge v. Stoner*, 16 Cal. 2d 423, 428 (1940).

wherein the Court commented on and explained the voluntary and involuntary trusts and the manner of their creation.

*Stanwood v. Sage*, 22 Cal. 517 (1863),

wherein it was held that the proceeds from sale of consigned goods did not enter the estate of the decedent consignee.

The trust is enforceable in bankruptcy or allied proceedings so long as the subject of the trust is ascertain-

able and it not held by a bona fide purchaser or the beneficiary did not knowingly permit the trustee to claim title as his own for the purposes of obtaining credit.

*In re Newcomb Interests, Inc.*, 171 F. Supp. 704 (1959);

*In re Rogal*, 112 F. Supp. 712 (1953);

*Breeze v. Brooks*, 97 Cal. 72 (1892);

*Schaefer v. Berinstein*, 180 Cal. App. 2d 107 (1960);

*Owins v. Laugharn*, 53 Cal. App. 2d ..... (1942).

It is the Applicant's position that an express trust was created by the terms of the Concession License Agreement entered into between Wohl Shoe Company and Rankin's on February 2, 1960. The essentials of the trust are set forth and they are in writing. The understandings of the trustee and the beneficiary are stated clearly.

It is irrelevant to the proper creation of a trust that the terms of the trust agreement contemplate commingling of the trust property with other property of the trustee.

*Restatement of Trusts 2d*, Sec. 179, p. 388.

It is there stated:

"By the terms of the trust the trustee may be permitted to mingle trust property with his own property. It may be expressly so provided by the terms of the trust or the character of the trust may be such as to make this proper. In the case of a formal trust, such as a trust created by will

or deed of trust, mingling by the trustee of trust property with his own property is improper, unless it is clearly permitted by the terms of the instrument. In the case of an informal trust such mingling is proper if such is the understanding of the parties as shown by their agreement or by custom. In such a case the trustee is not liable if he keeps on hand the amount of the trust property. Thus, a stockbroker who receives a customer's money for the purchase of certain securities or who sells certain securities for his customer under circumstances creating a trust of the money and not merely a debt . . . may be permitted to deposit the money in his own account in a bank, and, if so, he is not liable for breach of trust if the amount on deposit is not diminished by withdrawals or otherwise below the aggregate amount to which his customers are entitled."

See also, *State of New Jersey v. U. S. Steel Company*, 95 A. 2d 740 (1932) and *In the Matter of Yeager Co.*, 315 F. 2d 864 (1963). The latter case is quite similar on its facts to the instant case, with the exception that there was no express written trust agreement between the lessor and the beneficiary-lessee. In the *Yeager* case, the lessees of a department store were to turn over their cash and credit sales to the lessor. The lessor was to account to the lessees at a definite time and was to remit to them the net amount over rent and other agreed deductions. The court held that the lessor and the lessees had a debtor-creditor relationship as respects the credit sales when the les-



sees' petition for reclamation was denied after the lessor filed bankruptcy. However, the court states:

"Although nowhere in the lease was a trust provided for, they urge that one should be implied. . . . Since none was proven, it is unnecessary for us to go into the problem of tracing . . ."

As is evident, in the instant case, we have a written express trust agreement that was in full force and effect prior to and at the time of the bankruptcy.

**The Trust Property Continues Subject to the Trust Even After the Bankruptcy of Rankin's, Trustee Herein.**

*Gilbert's Collier on Bankruptcy*, 4th Ed., Sec. 1487 states:

"If the property in the hands of the bankrupt is impressed with a trust the property continues subject to the same trust, notwithstanding its bankruptcy . . . But the existence of a trust must be established before a claim can be made on that ground."

See also *Collier on Bankruptcy*, 14th Ed., Vol. 4, Sec. 70.15. In 9 *Am. Jur. 2d*, Sec. 902, p. 674, it is stated:

"Property held by the bankrupt in trust does not pass to the trustee in bankruptcy free from the interest of the beneficiaries, but is subject to reclamation by the beneficiaries if it can be traced and identified in the assets."

In support of the above proposition, see *Re Prudence Bomis Corp.*, 79 F. 2d 212 and *Re George Walter & Sons*, 10 F. 2d 463. In *Pearlman v. Reliance Ins. Co.*,



371 U.S. 132, 9 L. Ed. 190, 83 S. Ct. 232 Mr. Justice Black, in dealing with an argument under the Bankruptcy Act, stated:

“Ownership of property rights before bankruptcy in one thing; priority of distribution in bankruptcy of property that has passed unencumbered into a bankrupt’s estate is quite another. Property interests in a fund not owned by a bankrupt at the time of adjudication, whether complete or partial, legal equitable, mortgages, liens, or simple priority of rights, are of course not a part of the bankrupt’s property and do not vest in the trustee. *The Bankruptcy Act simply does not authorize a trustee to distribute other people’s property among a bankrupt’s creditor.*” (Emphasis added.)

It is Wohl Shoe Company’s position that the Receiver in Bankruptcy and Commercial Discount Corporation are attempting to distribute funds belonging to Wohl Shoe Company.

**There Is No Necessity to Trace the Funds in the Hands of Either the Receiver or the Other Respondent, Commercial Discount Corporation.**

(*Re: Warner Quinian Co.*, 86 F. 2d 103 (C.A. 2d 1936)). Held that a trust relationship established between the parties allows that proceeds of the trust to be part of the trust even where there is no language of a separate account where there is a consignment agreement between the parties.

It was held in *City of New York v. Rassner*, 127 F. 2d 703 (C.A. 2d 1942), that where the mingling of the trust funds takes place after bankruptcy, no tracing

is necessary by one claiming as the beneficiary of a trust.

It was further held in *U.S. National Bank in Johnstown v. Blauner's et al.* (75 F. 2d 826 (C.A. 3rd 1935)). It was held that a trust would be established where lessees occupied space in bankrupt's department store and the bankrupt was trustee or agent for the collection of money due on credit sales.

**It Is Not Necessary That the Concession Agreement Between Rankin's and Wohl Shoe Company Be Recorded Since the Uniform Commercial Code Was Not in Effect in California at That Time.**

*The California Uniform Commercial Code* provides in Sections 10101 and 10102 as follows:

§ 10101. Effective date

"This code shall become effective on January 1, 1965. It applied to transactions entered into and events occurring after that date."

§ 10102. Provision for Transition: Continuation Statement.

"Transactions validly entered into before the effective date specified in Section 10101 and the rights, duties and interests flowing from them remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law amended or repealed by this act as though such repeal or amendment has not occurred;"

The agreement between Rankin's and Wohl Shoe Company has created a trust which is enforceable against Rankin's representative and Commercial Discount Corporation, who took, subject to notice of said

trust, and the trust should be declared valid as against the Receiver and Commercial Discount Corporation, and the funds turned over to Wohl Shoe Company.

Wherefore, it is respectfully prayed that the order of September 23, 1966, affirming Referee's order of April 22, 1966, be vacated and set aside and an order be entered that the receiver turn back to Wohl Shoe Company the property of Wohl Shoe Company.

Respectfully submitted,

LEONARD A. GOLDMAN,  
*Attorney for Wohl Shoe Company.*

Dated May 10, 1967, at Los Angeles, California.





### **Certificate.**

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LEONARD A. GOLDMAN



No. 21638

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

In the Matter of

HUBBARD'S INC., a New Mexico Corporation, together with  
its wholly owned subsidiaries, RANKIN DEPARTMENT  
STORES, INC., a California corporation, and WEILL'S  
INC., a California corporation,

*Bankrupt,*

WOHL SHOE COMPANY,

*Appellant,*

*vs.*

PETER M. ELLIOTT, Ancillary Receiver of the estate of RAN-  
KIN DEPARTMENT STORES, INC., a California cor-  
poration, Bankrupt, and COMMERCIAL DISCOUNT COR-  
PORATION, a California corporation,

*Appellees.*

---

## APPELLEES' BRIEF.

---

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**FILED**

**JUN 9 1967**

**WM. B. LUCK, CLERK**

**JUN 13 1967**





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No. 21638

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poration, Bankrupt, and COMMERCIAL DISCOUNT COR-  
PORATION, a California corporation,

*Appellees.*

---

## APPELLEES' BRIEF.

---

### I.

#### STATEMENT OF CASE.

For the convenience of the Court, a designation of the parties and entities involved in this appeal is set forth:

1. "Hubbard's": Hubbard's, Inc., a New Mexico corporation. Hubbard's was adjudicated a bankrupt in proceedings pending in the District Court of the United States for the District of New Mexico.

2. "Rankin" or "Bankrupt": Rankin Department Stores, Inc., a California corporation. Rankin is a wholly owned subsidiary of Hubbard's. Ancillary bankruptcy proceedings were filed in the United States District Court, Central District of California. The



proceedings were referred to the Honorable Robert B. Powell. Prior to the bankruptcy proceedings, Rankin operated a retail department store and licensed other businesses to operate concessions in its store. Appellant was such a licensee and operated a shoe concession in Rankin's department store.

3. "Wohl" or "Appellant": Wohl Shoe Company is the parent company of Wetherby-Kayser Shoe Company. Wetherby-Kayser Shoe Company operated a shoe concession at Rankin. During the proceedings, Wetherby-Kayser was referred to as a division of Wohl and the names of Wohl and Wetherby-Kayser Shoe Company were interchangeably used by the parties, and reference to Wohl herein shall also include reference to Wetherby-Kayser Shoe Company. Wohl filed an Application to Reclaim the proceeds of accounts receivable in the ancillary bankruptcy proceedings. [R. 2 and 9.]

4. "Elliott": Peter M. Elliott was appointed ancillary receiver and is one of the Appellees.

5. "Commercial": Commercial Discount Corporation, a California corporation. Commercial financed the accounts receivable of Rankin and is one of the Appellees. [R. 27, ¶ 3.]

Wohl filed an Application and an amended Application to Reclaim the proceeds of accounts receivable arising out of charge sales of shoes and related items made by Wetherby-Kayser while it was a concessionee in the department store operated by Rankin. [R. 2 and 6.] Wohl contended that a Concession License Agreement, hereinafter referred to as the "Agreement", between Wetherby-Kayser Shoe Company and Rankin dated February 2, 1960, entitled it to reclaim \$9,942.45 arising from charge sales in the shoe concession. [R. Ex.



B and R. 9.] Elliott and Commercial filed responsive pleadings denying that Wohl was entitled to reclamation. [R. 7 and 12.] A stipulation of facts was prepared by Wohl, Elliott, and Commercial and submitted to the Referee. [R. 27.] No other evidence was offered by Wohl.

The Referee prepared a Memorandum Opinion stating that while the matter was under submission, *Lord's, Inc. v. Malley* (7th Cir. 1965), 356 F. 2d 456, cert. denied in 385 U.S. 847, was decided and was practically on all fours with the matter under submission and ruled in favor of Appellees. [R. 45.]

On April 22, 1966, an Order was entered by the Referee denying Wohl's Application to Reclaim. [R. 52.] Wohl filed a Petition for Review. [R. 54.] On Review, the District Court sustained the findings of fact and conclusions of the Referee and affirmed the Referee's Order. [R. 58.]

## II.

### STATEMENT OF FACTS.

For convenience and brevity, the Appellees adopt Appellant's Statement of Facts.

## III.

### SUMMARY OF ARGUMENT.

The Referee found that no trust relationship was created by the Concession License Agreement entered into between Appellant and Rankin and that the relationship between Appellant and Rankin was that of creditor and debtor. Appellees contend that the Referee's findings, affirmed by the District Court, are not clearly erroneous.

IV.  
ARGUMENT.

THE REFEREE DID NOT ERR IN FINDING THAT THE CONCESSION LICENSE AGREEMENT ENTERED INTO BETWEEN APPELLANT AND RANKIN DID NOT CREATE A TRUST RELATIONSHIP BETWEEN THEM.

A. A Condition Precedent to Tracing Funds or Accounts Receivable Into the Hands of a Trustee in Bankruptcy Must Be That a "Trust" Was Established.

Appellant had the burden to establish a trust relationship between it and Rankin.

"... clearly the burden rests upon the claimant to establish the original trust relationship. He must prove his title and identify the trust fund or property . . . However, if it cannot first be shown that a trust has been created, there is no necessity for inquiry as to whether the property can be identified or traced."

Vol. 4, *Collier on Bankruptcy* (14th Ed.) pp. 1205, 1206.

The only reference in the Agreement to a trust is in Paragraph 16 of said Agreement, which provides:

*"All sales, cash and charge, shall be made in the name of Concessioner [Rankin] and shall be recorded by Concessioner at its expense. All monies received by Concessionee's [Appellant's] employees, representing proceeds from sales, shall immediately be turned over to Concessioner [Rankin] who shall hold same in absolute trust for Conces-*

sionee; and, though commingled with other funds of Concessioner's same shall nevertheless be and remain in trust for Concessionee until paid Concessionee in accordance with the provisions of paragraph #7 hereinabove." (Emphasis added.)

The only monies received by Appellant's employees would be from cash sales. There is no reference in the Agreement to a trust between the parties concerning the collections of the charge sales. To the contrary, Paragraph 17 of the Agreement provides:

"All charge sales made by Concessionee shall be submitted to Concessioner for approval which shall not be unreasonably withheld. *Concessioner shall act as Concessionee's agent in collecting and recording said charge sales and shall bear all expenses incident thereto. Concessioner guarantees the payment of all charge sales made by Concessionee and approved by Concessioner.*" (Emphasis added.)

Appellant's employees would not receive monies on charge sales and, therefore, assuming for argument only that a trust was created between Appellant and Rankin, the "res" of the trust would only pertain to monies received from cash sales. Charge sales were handled in a completely different manner. [Ex. B, ¶ 17.] Assuming for argument only that a trust was created regarding the proceeds of cash sales, Appellant has not alleged or proved that the Agreement created a trust regarding the proceeds of charge sales which it seeks to reclaim. Further, Appellant has not sustained its burden of proof in proving a trust between it and Rankin regarding monies received from cash sales. Appellant has the burden of proof to



establish that Rankin at the time of the filing of the proceedings had monies in its possession from cash sales made by Appellant and that the monies were turned over to Elliott. Appellant has not even proved that the Elliott received any monies from its concession. See Stipulation of parties:

“4. That the Receiver, at the time of the closing of Rankin, received approximately \$3,200.00 from the approximate number of thirty cash registers at Rankin, but there is no determination made as to which belongs to the cash registers in the department operated by Wetherby-Kayser.” [R. 27, ¶ 4.]

Appellant relies on Paragraph 16 of the Agreement as a basis for its contention that an express trust was created between it and Rankin. (Op. Br. p. 6.) Implicit in Appellant’s argument is that the subject of the trust is the charge sales; otherwise there is no subject matter of the trust, which is one of the essential elements of a creation of a trust. See California Civil Code, Section 2221, which provides:

“§2221. Voluntary trust, how created as to trustor. Subject to the provisions of section eight hundred and fifty-two, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty:

1. An intention on the part of the trustor to create a trust, and,
2. The subject, purpose and beneficiary of the trust.”

Except for the first sentence in Paragraph 16 of the Agreement, no other reference is made in Paragraph 16



or elsewhere in the Agreement to the charge sales being held in trust. The mere use of the words “trust” or “trust fund” do not necessarily result in the creation of a trust:

“Unless the parties’ own characterization of the nature of their relationship is competent evidence, a question that has not been raised and is not being decided, the plaintiff’s position is almost if not entirely without support, for he depends for his trust theory on Hagen’s use of the words ‘as a trust fund’ on several occasions. . . . Were the trial court’s attention limited to these words, as it faced the task of determining the relation created by the parties, it might well have been required to hold that a technical voluntary trust had been created. However, ‘there is no magic in mere words of this character’, as our Supreme Court stated in *Estate of Shaw*, (1926) 198 Cal. 352, 360 [246 Pac. 48], in determining that a trust relation could arise without the use of the words ‘trust’ or ‘trustee’. So, too, it has been held that the use of the words ‘in trust’ does not necessary result in the creation of a trust, if the intention appears to be otherwise. (In re Dever’s Will, (1921) 173 Wis. 208 [180 N. W. 839, 841].)”

*Anderson v. Hagen*, 1937, 19 Cal. App. 2d 714, 719-720.

The provisions of the Agreement, and the conduct of the parties as set forth in the Stipulation of Facts, conclusively support the Referee’s finding that no trust relationship with its attendant fiduciary duties was created by the Agreement.

**B. The Relationship Between Appellant and Rankin Was a Debtor-Creditor Relationship.**

Rankin had to settle weekly with Appellant under the Agreement for all net sales, cash and charge. Paragraph 7 of the Agreement provides:

“Concessionee’s sales shall be turned over to Concessioner who shall remit for same in the following manner: On Wednesday of each week for all net sales, cash and charge, made during the preceding calendar week ending on Saturday. From the remittances, Concessioner shall deduct the Concession Fee provided for hereinabove, together with any and all incidental expenses, if any, authorized by Concessionee and which have been paid by Concessioner for or on Concessionee’s account during the entire preceding calendar week. In the event this agreement is terminated by lapse of time or otherwise, Concessioner shall make full settlement at once, for all sales, cash and charge, made by Concessionee, up to and including the final day’s sales in Concessionee’s departments.”

As set forth in Paragraph 5 of the Stipulation, the settlement was changed from a weekly settlement to a monthly settlement by Appellant and Rankin:

“5. That it was the practice of Rankin and Wetherby-Kayser to commingle the receipts from both cash sales with all of the other receipts of Rankin. That Rankin settled on a monthly basis up until June, 1963; the monthly payment included all of the cash and charge sales made during the previous month.” [R. 27, ¶ 5.]

It is important to note that the Agreement originally provided for weekly settlements on charge sales which under normal business practices would not even be billed until the month following the charge sale. Rankin had to pay Appellant even if the account debtor failed to pay or went into bankruptcy. All credit risk was assumed by Rankin. Even the risk of bad checks was assumed by Rankin pursuant to the Agreement:

“All customers’ checks in payment of merchandise shall be submitted by Concessionee for Concessioner’s approval, said approval shall not be unreasonably withheld, and when given shall constitute full guarantee of payment thereof to Concessionee.”  
[R. Ex. B, ¶ 18.]

Rankin had unrestricted use of the funds during the period between collection and settlement. The collections were not to be turned over on demand, but on agreed dates. Receipts from cash sales in the shoe concession were not segregated from other receipts of Rankin. [R. 27, ¶ 5.] There is no doubt that the relationship and conduct of the parties is inconsistent with a trust agreement between the Appellant and Rankin with its attendant fiduciary duties.

Appellees have not been able to find any California cases or cases in this circuit that are in point; however, there are cases in other circuits that are apposite. The facts presented in this case are almost on all fours with the facts presented *In the Matter of the Yeager Company* (6th Cir. 1963), 315 F. 2d 864. In said case



the appellant-lessees by written instrument leased space in the department store operated by the bankrupt. All sales made by the appellant-lessees were made as if they were merely a department in the bankrupt's store and all sales were for cash, except such sales as *Yeager* accepted for credit. All monies derived from the sales were immediately turned over to the bankrupt who kept an account thereof and on the 15th day of the following month accounted for all cash received and for sales accepted by it for credit and paid the lessee in full therefor less 10% for rental and other agreed deductions. The lessees would receive cash for all of their sales even though the bankrupt might not collect on the charges accounts which it accepted for credit for many months. The lessees' accounts receivable were carried on *Yeager's* books as its own property and commingled with other customers' accounts. At the time of bankruptcy, credit sales of \$23,301.25 had not been accounted for. The Referee in Bankruptcy denied the reclamation petition of the lessees to require the trustee in bankruptcy to account for the credit sales. The Referee's order was affirmed by the District Judge and by the Circuit Court.

In *Yeager* the lessees claimed that a fiduciary relationship with respect to the accounts receivable existed between them and the bankrupt under which they were entitled to the equitable remedy of accounting. The lessees argued that a trust should be implied, although the lease did not provide for one. The court disagreed,



stating that merely because the lessees might be entitled to an equitable remedy of accounting under state law does not mean that they have established a trust and may recover in a reclamation proceeding in a bankruptcy court. The court in *Yeager* on page 865 stated:

“As we view the arrangement between the parties, Mendel and Marshall [the lessees] carried no customer charge accounts. Whenever sales made by Mendel and Marshall had been accepted for credit by Yeager, the latter became the owner of them. *Yeager's* only obligation was to pay Mendel and Marshall in full for the accounts which it accepted for credit on the 15th day of the following month. All losses in the collection of the accounts were borne by Yeager. The only credit risk assumed by Mendel and Marshall was in collecting the amounts due them from Yeager. The relationship between Mendel and Marshall and Yeager *with respect to the accounts receivable accepted for credit by Yeager was that of debtor and creditor*. There was no trust established either express or implied. Since no trust was proved, it is unnecessary for us to go into the problem of tracing or consider the admissibility of expert testimony offered at the hearing in connection with that subject.” (Emphasis added.)

In our case Appellant carried no customer charge accounts; in fact, Rankin guaranteed payment to Appellant of all charge sales it approved. Rankin had to pay Appellant in full for the charge sales which it accepted for credit as well as for the cash which it received, first weekly and then monthly. All losses in the collection of

the charge sales were borne by Rankin. Also, Appellees contend that no language in the Agreement between Appellant and Rankin can be found which creates a trust of the proceeds of the charge sales. Appellant attempts to distinguish the *Yeager* case by claiming that there was no express written trust agreement between the lessor and the beneficiary-lessee in said case, concluding:

“As is evident, in the instant case, we have a written express trust agreement that was in full force and effect prior to and at the time of the bankruptcy.” (Op. Br. p. 8.)

Appellant fails to identify the provisions of the Agreement creating a trust regarding charge sales because the Agreement does not contain such provisions. Appellees contend that except for Appellant's conclusion, it has not identified or proved that a trust of the proceeds of charge sales was created by the Agreement and the Court's statements in the *Yeager* case are applicable to the facts before this Court.

Another case which discusses whether a trust or debtor-creditor relationship was established between a reclamation petitioner and a bankrupt is *In re Chicago Express, Incorporated* (S.D.N.Y. 1963), 222 F. Supp. 566. In said case the motor carrier had an arrangement with a railroad company which transported the motor carrier's trucks by “piggy back.” The railroad argued that the proceeds received by the debtor from its shippers and consignees, to the extent that they were attributable to the “piggy back” hauls, constituted trust funds for its benefit which it could reclaim in the



bankruptcy proceedings. The railroad apparently argued that a trust relationship was established because the debtor may have had a duty to account to the railroad for the funds it collected. The Referee held that only a debtor-creditor relationship was established. One of the factors which led the court to conclude that the relationship between the parties was one of creditor and debtor was the unconditional duty of the debtor to pay freight charges to the railroad within 15 days of the date of billing. The court did not find a trust relationship from the debtor's obligations to account to the railroad for funds it collected on the hauls.

Another case holding that only a debtor-creditor relationship was established on facts similar to the facts in our case is *In Re Martin's* (D.C. N.Y. 1935), 11 F. Supp. 99. The debtor in said case was a department store which filed a voluntary petition for reorganization. The petitioner in said case was the lessee of the fur department. Under the arrangement between the parties the lessee purchased all its merchandise and the debtor was not responsible for payment of the merchandise nor could it fix a price at which they were to be sold. The lessee paid 10% of all cash sales and 12½% on all charge sales to the debtor as rent. The debtor had to pay to the lessee the amount of all charge sales 60 days after the charge sale was made whether the charge sale was collected or not. The court held that the collection of the charge sales was the debtor's obligation and held that the relationship between the debtor and the petitioner was that of debtor and creditor. In

the case of *Issac McLean Sons Co. v. William S. Butler & Co. (In Re Gilchrist Co.)* (D.C. Mass. 1913), 208 Fed. 730, the court found a debtor and creditor relationship was established when the agreement between the lessor and lessee provided that all charge sales and cash were to be paid over to the lessor and the lessor would have to pay to the lessee the receipts from all the sales minus certain deductions monthly. The court held that no trust relationship existed. The court said at page 732:

“The company’s duty with regard to the proceeds so received was only that of accounting for them at the agreed times and on the agreed terms. \* \* \* It was therefore not only free to mingle these proceeds with its own funds instead of keeping them in a separate fund, but that it should so mingle them was expressly stipulated. The proceeds were to remain part of its own funds, subject only to the obligation of accounting for them at the agreed times. I do not see how it can be said to have duty of custody or management regarding these proceeds, differing from that which it owed to all its creditors as to its own funds in general \* \* \*”

In *United States Nat’l Bank in Johnston, Pa. v. Blauner’s Affiliated Stores, Inc., et al.* (3rd Cir. 1935), 75 F. 2d 826, affirming 7 F. Supp. 850, the court held that the agreement between the parties created a trust. The lessor was to collect the credit accounts and to hold the money collected in a separate account. The *Blauner* case is distinguishable from the facts before the court, as in the *Blauner* case there was no requirement that the lessor account weekly or



monthly for the credit sales made by the lessee and the money collected by the lessor was to be held in a separate account. In our case, Rankin had to remit weekly and then monthly for all credit sales made by Appellant and it had the right to commingle all funds. The requirement that Rankin account first weekly and then monthly to Appellant and the unlimited right of Rankin to commingle all funds generated in the department store, distinguishes this case from the facts in the *Blauner* case and created a debtor and creditor relationship and not a trust relationship between Rankin and Appellant.

A recent case where the facts are almost identical to the facts before this Court is *Lord's Inc. v. Malley* (7th Cir. 1965), 356 F. 2d 456, cert. denied in 385 U.S. 847, where despite the use of the word "trust" in an agreement between a lessee of space from a bankrupt department store and the department store, the court found a mere debtor-creditor arrangement existed between the two parties. Appellant does not even attempt to distinguish said case in its Brief, although the Referee cited said case in his Memorandum Opinion as controlling on the facts in this matter. In said case the bankrupt leased space to the lessee, a shoe retailer, under a lease agreement which provided that all money and accounts received by the bankrupt would be held in trusts for the lessee. No separate accounts were maintained, however, and the Court found that no trust was created and the relationship between the lessee and the bankrupt was that of a debtor and a creditor.

Contrary to the Agreement before this Court, the Agreement in *Lord's* provided that *all monies and accounts* received by the Concessioner, the bankrupt, would

be considered to be held by the bankrupt in trust for lessee, even if commingled:

“It was agreed that sales would be made in the name of Lord’s and recorded by Lord’s at its expense, and that all moneys received by Cutter-Karcher’s employees would be turned over immediately to Lord’s. The agreement provided, however, in Article Sixteenth of the agreement that all the moneys and accounts so received by Lord’s on account of sales in Cutter-Karcher’s department would be considered to be held by Lord’s:

\* \* \* in Trust for Lessee [Cutter-Karcher], and if mingled with Lessor’s [Lord’s] funds, either in cash drawer or deposit in the bank, or wherever such commingling may be effected, such funds shall nevertheless and hereby are considered trust funds, and are to be so held by Lessor in trust for Lessee until Lessor has paid to Lessee the total amount of such sales and receipts in accordance with the provisions hereof. In the event title to said funds shall at any time be called into question, the parties hereto desire to clearly indicate their intention that these funds shall be and are hereby considered and regarded by the parties hereto as trust funds irrespective of whether they are commingled or not, and said funds shall be held in trust for the benefit of Lessee.” (356 F. 2d 456, 457.)

The Agreement in our case provides, contrary to the Agreement in *Lord’s* that:

“16. All sales, cash and charge, shall be made in the name of Concessioner and shall be recorded by Concessioner at its expense. All monies re-

ceived by Concessionee's employees, representing proceeds from said sales, shall immediately be turned over to Concessioner who shall hold same in absolute trust for Concessionee; and, though, commingled with other funds of Concessioner's same shall nevertheless be and remain in trust for Concessionee until paid Concessionee in accordance with the provisions of paragraph #7 hereinabove."

The only monies received by Appellant's employees would be from cash sales and the term "trust" as used in Paragraph 16 of the Agreement is applicable only to "monies received by Concessionee's employees, representing proceeds from said sales," sales referring to "cash sales."

As the Court in *Lord's* states:

"There is nothing magical in the word 'trust' standing alone." (365 F. 2d 456, 458.)

The Court, after citing several authorities, held that insertion of the word "trust" did not create a trust between the parties. Discussing the relationship between the parties, the Court stated:

"All sales here were made in the Lessor's name, all proceeds of such sales were immediately turned over to the Lessor with the understanding that they could be commingled with the Lessor's own funds. Not on demand, but on agreed dates, the Lessor paid a net amount (less certain agreed disbursements, returns, etc.) out of the Lessor's own general funds.

"From the time of its receipt until settlement date (at least 15 days) the Lessor had unrestricted



use of the funds. A similar relationship in *In re Martin's*, supra, was held to be consistent with that of debtor and creditor and not that of fiduciary and beneficiary." (356 F. 2d 456, 458.)

The Court's statements in *Lord's* are applicable to the facts now before this Court, and the relief sought by Appellant should be denied.

Appellees have not raised any question regarding the Uniform Commercial Code and therefore no reference will be made in this Brief to the Uniform Commercial Code.

**C. The Referee's Findings of Fact and Conclusions of Law Are Not Clearly Erroneous and the District Court Did Not Err in Affirming the Referee's Order.**

General Orders in Bankruptcy No. 47 states that "unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous." Federal Rule of Civil Procedure 52a also provides in part that "findings of fact shall not be set aside unless clearly erroneous. . . ."

While it is true that the findings of a Referee are not necessarily conclusive on an appellate court, it appears to be well established that an appellate court should not disturb the Referee's findings unless there is overwhelming evidence that the Referee was mistaken and that the mistake would lead to a miscarriage of justice.

In the matter before the Court, the Referee found that no trust relationship was created between Appellant and Rankin by the Agreement.



This Court has stated that even in the absence of any need to judge the credibility of witnesses before the Referee, the reviewing court should exercise some degree of judicial restraint in regard for the expertise of the Referee in Bankruptcy.

See *Olympic Finance Co. v. Thyret* (9th Cir. 1964), 337 F. 2d 62.

V.

CONCLUSION.

For the foregoing reasons, the Order of the District Court should be affirmed.

BUCHALTER, NEMER, FIELDS &  
SAVITCH,  
NAT ROSIN and  
HARRY L. SCHUMAN,

*Attorneys for Appellees, Peter M. Elliott,  
Ancillary Receiver of the estate of Ran-  
kin Department Stores, Inc., a Cali-  
fornia corporation, and Commercial  
Discount Corporation, a California cor-  
poration.*



### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RONALD E. GORDON









No. 21639

In the  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JEAN J. MINTHORNE and MELANIE	)
MINTHORNE, husband and wife,	)
	)
Appellants and Cross-Appellees,	)
	)
vs.	)
	)
THE SEEBURG CORPORATION, a corporation;	)
SEEBURG DISTRIBUTING COMPANY, a	)
corporation,	)
	)
Appellees and Cross-Appellants.	)

---

APPELLEES' PETITION FOR REHEARING

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STATEMENT

Minthorne and Seeburg made a general agreement settling many financial relationships, all as is suggested in the opinion of the Court. In the course of the readjustment of relationships, Minthorne was left to lease or operate a route of equipment in Arizona, on which he was responsible for a series of payments, and for which he had never paid anything.

Nothing having been paid, the property was repossessed by Seeburg, the original owner, and sold for \$40,000 less than what was owed to Seeburg.





This repossession was taken, in Seeburg's view of the matter, in accordance with an elaborate contractual provision in the basic contract, known as Exhibit D, which governed repossession rights. Exhibit D included, among other arrangements, a provision that Seeburg should give Minthorne the opportunity to take over the equipment and operate it. Seeburg contended that such an opportunity had been given to Minthorne, but the jury found to the contrary.

The issue then became, what consequence does this failure have? There were two possible losses to be distributed:

(a) Seeburg's loss on the property; and

(b) Minthorne's loss for what was allegedly a wrongful repossession.

The District Court held that the provision in question was "a condition precedent, not a covenant or a promise," and that therefore Seeburg could not affirmatively recover the amount of the deficiency from Minthorne. On the other hand, it held that Minthorne was not entitled to damages for loss of the opportunity to take over and operate the equipment, because the clause in question was a condition upon the right to repossess rather than a promise of an opportunity to take over.

This Court has now reversed, suggesting (perhaps but not certainly; we shall discuss this) that the language in question was both a condition and a covenant, a condition on Seeburg's right to repossess and a covenant to give Minthorne



the right to take over and operate; the matter has been remanded for consideration of damages. We respectfully submit that this is error and ask for reconsideration.

### ARGUMENT

1. The condition as a precedent and also as a covenant is used in commercial situations where a party has agreed to make a purchase; if he does not get delivery of the requisite quality, Wheeling Stamping Co. v. Birdsboro Steel Foundry & Machine Co., 245 F.2d 752 (3d Cir. 1959) Restatement, Contracts § 257, illustration 2 (1932); or delivery on time, General Electric Co. v. Chattanooga Coal & Iron Corp., 241 F.38 (6th Cir. 1917), Koolvent Alum. Awning Co. v. Sperling, 16 N.J. Super. 444, 84 A.2d 762 (1951); or notice, Internatio-Rotterdam, Inc. v. River Brand Rice Mills, Inc., 259 F.2d 137 (2d Cir. 1958), cert. denied, 358 U.S. 946, 79 S. Ct. 352, 3 L. Ed. 2d 352 (1959), Rice Growers Ass'n v. F. Carrera & Hno, Inc., 234 F.2d 843 (1st Cir. 1956), he need not pay, because the condition has not been met; and he can recover on the covenant to deliver for his loss of profit or similar damage, Bartlett & Co. Grain v. Merchants Co., 323 F.2d 501 (5th Cir. 1963) (damages for poor quality), Time Finance Co. v. Beckman, 295 S.W.2d 346 (Ky. 1956) (damages for late delivery). In this sense the same agreement may contain both a condition and a covenant. The





passage in Witkin, California Law, § 233, p. 262, is of this type.\*

But in other situations, the concepts are considered as disjunctive. E.g., Southern Sur. Co. v. MacMillan Co., 58 F.2d 541 (10th Cir. 1932), cert denied, 287 U.S. 617, 53 S. Ct. 17, 77 L. Ed. 536 (1932) (clause requiring obligees to give surety notice of any default by principal held to be covenant). Baker Aircraft Sales, Inc. v. Cassel, 200 Cal. App. 2d 563, 19 Cal. Rptr. 581 (1962) (clause requiring repossessed property to be sold in accordance with California pledge laws held to be covenant). Larson v. Thoreson, 116 Cal. App. 2d 790, 254 P.2d 656 (1953) (obligation to match appellant's monetary contribution to joint venture held to be a covenant). The primary goal of interpretation in this area is to avoid forfeitures; that is why the interpretation of covenant is frequently favored. Charles Ilfeld Co. v. Taylor, 156 Colo. 204, 397 P.2d 748 (1964). See also 5 Williston, Contracts § 665 (3d ed. 1961), Green County v. Quinlan, 211 U.S. 582, 29 S. Ct. 162, 53 L. Ed. 335 (1909). To find that the clause is both a covenant and a condition precedent may risk a forfeiture of Seeburg's deficiency rights and make them liable for damages as well.

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\*The three Witkin citations are first, the Restatement, cited above; and second, two cases which illustrate other points in the long paragraph to which it is appended but do not relate to this matter. See also § 261 of the same Restatement, referring to the fact that the same words may sometimes mean that one party promised performance and that the other party's promise is conditional on that performance.



2. We are then brought back to the basic purpose of the entire contract, and Exhibit D, and this clause. The purpose of the contract was to reorder the commercial relations of the parties. By virtue of the contract, Seeburg took over about \$800,000 of Minthorne's liabilities, and left him primarily liable on \$569,000. If he or his operators did not keep up the payments, Seeburg could repossess; after 90 days of non-payment, this was an absolute right. Within 90 days, if Seeburg did not give Minthorne an opportunity to take over the route and operate it, the most that can be said is that Seeburg forfeited the right to collect its \$40,000 deficiency judgment. Nothing in the agreement compelled Seeburg to do any more for Minthorne than indemnify his \$800,000 in liabilities.

3. We respectfully submit that the Court's interpretation reads paragraph 4 out of Exhibit D. This paragraph deals with Seeburg's right, after 90 days, to take whatever action "it shall deem to its best interests."

And under what circumstance was it given this free hand? If the parties "fail to reach a mutual agreement as to the action to be taken" during the 90 days.

The Court reads the language in paragraph 2 of Exhibit D as compulsive; Seeburg covenanted to give Minthorne "the opportunity to take over the said equipment and operate it himself." But there cannot be a covenant to reach a "mutual agreement." "Take over" and "operate" are not self enforcing. What was to





be done with the existing deficiencies? Pay, no pay, delay? What was to be done with machines lost or destroyed? What was to be the schedule of payments? Who was to advance to Redisco, and how much?

All these elements had to be the subject of a future agreement, a "mutual agreement." And an agreement to agree is no agreement at all.

An agreement to make in the future such a contract as may be agreed upon at the later time amounts to nothing, is not binding, and cannot be made the basis of a cause of action. Where a final contract fails to express some matter as, for instance, a time of payment the law may imply the intention of the parties, but where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, such as approval of the final plans and specifications for the erection of a building, there can be no implication of what the parties will agree upon. 12 Cal. Jur.2d 315 (1932).

As a standard of interpretation, a contract will not be interpreted to be ineffective where this can be avoided. Restatement, Contracts § 236 (1932).

4. We concluded our main brief by assuming that, in case of reversal, the damages question would go back to the Court below, and therefore did not brief it. We assume that this is the purpose of this Court; i.e., to send back the damages question unprejudiced in all of its alternatives.

But we fear that the language of this Court may inadvertently prejudice the damages question. We assume, and will



argue below, if the motion for rehearing is not granted, that Minthorne is entitled to the fair market value of the equipment, plus any loss of profits pending its replacement, adjusted downward by the amounts owed Seeburg. See generally 2 Gilmore, Security Interests in Personal Property, § 44 (1965).

We are concerned that the Court's discussion of conditions and covenants may be construed to prejudice the damages position of Seeburg and, as we have suggested, be construed to cause a forfeiture. We do not believe that this is the intention of the opinion; we think that its purpose is to conclude only that Minthorne had a covenant which was breached by what it held to be a wrongful repossession, so that the normal principles of law applicable to damages for wrongful repossession would apply. We submit that the language of the Court suggesting that there is both a condition and a covenant will complicate the damages issue and protract litigation which is already too old; we ask for clarification in this respect.

#### CONCLUSION

The petition for rehearing should be granted.

Respectfully submitted,

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July, 1968





I certify that, in connection with the preparation of this petition, I have examined Rules 31, 32 and 40 of the Federal Rules of Appellate Procedure, and Rules 18, 19, 23 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing petition is in full compliance with those rules.

I further certify that in my judgment this petition is well founded and not interposed for delay.

JOHN P. FRANK



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STATE OF ARIZONA       )  
                              ) ss.  
County of Maricopa    )

JOHN P. FRANK, being first duly sworn, deposes and says: That he has filed and served this petition for rehearing on this 19th day of July, 1968, by causing twenty-five copies to be mailed to the Clerk of the United States Court of Appeals, San Francisco, California, and by mailing one copy each to Mr. Coit I. Hughes, Hughes & Hughes, 725 First National Bank Building, Phoenix, Arizona 85004, and Mr. Harry A. Stewart, Jr., Suite 8, 3440 North 16th Street, Phoenix, Arizona 85016.

JOHN P. FRANK

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JOHN P. FRANK

Subscribed and sworn to before me this 19th day of  
July, 1968

Francis Bailey  

---

Notary Public

My commission expires:

August 6, 1972



**United States Court of Appeals**  
**FOR THE NINTH CIRCUIT**

BRENT L. SELICK,

Appellant,

vs.

THEODORE WILLIAM BELL, SR. ,  
and MYRTLE WATSON HARRIS BELL,

Appellees.

On Appeal From the United States District Court  
For the Southern District of California

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**BRIEF OF APPELLEES**

---

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**FILED**

AUG 30 1967

WM. B. LUCK, CLERK





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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

BRENT L. SELICK,

Appellant,

vs.

THEODORE WILLIAM BELL, SR.,  
and MYRTLE WATSON HARRIS BELL,

Appellees.

---

BRIEF OF APPELLEES

---

STATEMENT

Jurisdiction in this cause rests upon Sections 24 and 25 of the Bankruptcy Act, 28 U. S. C. 1291.

STATEMENT OF THE CASE

Appellant filed an action in the Superior Court, County of San Mateo, State of California, and obtained an inpersonam judgment upon a suit alleging failure of the buyer to perform a conditional sales contract for the purchase of a vessel. Within four months of the filing of the voluntary petition in bankruptcy by THEODORE WILLIAM BELL, SR., and MYRTLE WATSON HARRIS BELL, appellant filed an abstract of judgment with the County Recorder of San Diego County. An action was

brought before the Referee pursuant to 67a-1 of the Bankruptcy Act and the Referee declared the appellant's judgment lien to be void. The District Court affirmed the Referee and this appeal is taken from said order of affirmation.

### ARGUMENT

1. The contract for the sale of a vessel is not a maritime contract. Grand Banks Fishing Company, Inc. vs. Styron, 114 5th, Supp. 1, 1953, A. M. 2172 (D. Me. 1953). In the Grand Banks Fishing Company, Inc., case the libellant was a purchaser of a vessel on a sales contract who sued for breach of warranty after discovering through a survey certain defects in the purchased vessel. The Court quoted the Circuit Court In the Ada, 2 Circuit 1918, 250f 194 at page 197 and 199 wherein that Court said:

"The rule is settled that contracts for---selling a ship are not maritime contracts within the jurisdiction of admiralty".

The lien in question being a lien upon real property can hardly be considered a maritime lien. A process flowing from an inpersonam judgment, even though said judgment be rendered through a court in admiralty, may be voided by the Bankruptcy Court. Foust vs. Munson Steamship Lines, 299 U. S. 77 (1936).

Answering subdivision D, page 9 of Appellant's brief, it is respectfully submitted that he is treating with the state laws relative to setting aside judgments usually default judgments. Section 67a-1 of the Bankruptcy Act does not purport to nullify judgments but only certain types of liens proceeding from judgments. It in no way conflicts with the state laws of California.



CONCLUSION

It is respectfully submitted that because the judgment in question proceeded from a cause of action not within admiralty jurisdiction, and was an in personam judgment which by recording, created a lien on real property the Referee in Bankruptcy acted properly and within his jurisdiction in voiding said lien pursuant to the terms of 67a-1 of the Bankruptcy Act.

Dated: August 29, 1967

Respectfully submitted,

SMITH, BIGGINS & CROCKETT

By: /s/ JAMES J. BIGGINS, JR.

Attorneys for Appellees

CERTIFICATION

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is fully in compliance with said Rules.

/s/ JAMES J. BIGGINS, JR.



✓  
No. 21,642

IN THE  
United States Court of Appeals  
For the Ninth Circuit

---

SONORA COMMUNITY HOSPITAL, a California corporation,  VS.  COMMISSIONER OF INTERNAL REVENUE,  <i>Respondent.</i>	} <i>Appellant,</i>
---	---------------------

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APPELLANT'S OPENING BRIEF

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FILED

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No. 21,642

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

---

SONORA COMMUNITY HOSPITAL,  
a California corporation,

*Appellant,*

VS.

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

---

**APPELLANT'S OPENING BRIEF**

---

**INTRODUCTION**

For purposes of this brief the appellant, Sonora Community Hospital, a California corporation, will be referred to as appellant; the respondent, Commissioner of Internal Revenue, will be referred to as respondent; Sonora Hospital Laboratory and X-ray Company will be referred to as Laboratory and X-ray; Ben R. Boice, M.D. will be referred to as Dr. Boice; Paul L. Anspach, M.D. will be referred to as Dr. Anspach; Helen Anspach, M.D. will be referred to as Dr. Helen, and Jack Rucker and James C. Rucker will be referred to as the Rucker Bros.

This action originated in the Tax Court of the United States and is an action on behalf of the ap-



pellant, a corporation organized pursuant to the General Non-profit Corporation Law, Part 1 of Division 2 of Title 1 of the Corporations Code of the State of California. Appellant owned and operated at all times in question a 42 bed general hospital in the City of Sonora, County of Tuolumne, State of California, and within the territorial jurisdiction of the United States Court of Appeals for the Ninth Circuit. The income tax returns for the years in question were filed with the District Director of Internal Revenue in San Francisco, California. (Int. Rev. Code Section 7482.)

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#### **STATEMENT OF THE CASE**

Appellant was organized as a non-profit corporation on March 21, 1958 and on or about March 31, 1958 appellant acquired all of the assets of the Sonora Community Hospital and since said date has owned and operated the said general hospital facility.

The fiscal year of appellant was April 1, of each year to March 31, of the following year. Appellant filed a Return of Organization Exempt from Income Tax (Form 990-A) for each of the fiscal years ending March 31, 1959, March 31, 1960, and March 31, 1961. (Findings of Fact p. 2; Stip. of Fact No. 1.)

On February 29, 1960, the respondent ruled that appellant was exempt as an organization described in Section 501(c)(3) of the Internal Revenue Code of 1954 on the basis that appellant had shown that it was organized and operated exclusively for charitable pur-



poses. This ruling was made effective beginning April 1, 1958. (Findings of Fact p. 13; Stip. of Fact No. 4.)

On December 26, 1962, the respondent revoked the ruling of February 29, 1960. (Findings of Fact p. 13; Stip. of Fact No. 5.)

The computation of the tax due under the decision of the Tax Court in this action has been computed and stipulated to by the parties. (Tax Court Decision dated Sept. 19, 1966.)

Therefore, the sole question is whether appellant was exempt from tax as a corporation “organized and operated exclusively for . . . charitable . . . purposes, . . . no part of the net earnings of which inures to the benefit of any private . . . individual. . . .” (T. C. Opinion p. 14.)

The Internal Revenue Code of 1954, Section 501 (c)(3) reads as follows:

Sec 501. Exemption from Tax on Corporations,  
Certain Trusts, Etc.

(a) Exemption From Taxation.—An organization described in subsection (c) or (d) or section 401(a) shall be exempt from taxation under this subtitle unless such exemption is denied under section 502, 503, or 504.

\* \* \* \* \*

(c) List of Exempt Organizations.—The following organizations are referred to in subsection (a):

\* \* \* \* \*

(3) Corporations, and any community chest, fund, or foundation, organized and operated ex-

clusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, . . .

---

### **SPECIFICATION OF ERRORS**

- I. IT WAS ERROR FOR THE TAX COURT TO HOLD THAT THE APPELLANT'S TAX EXEMPT STATUS WAS AFFECTED BY THE DOCTOR'S RECEIPT OF INCOME FROM THE SONORA HOSPITAL LABORATORY AND X-RAY COMPANY.**

The respondent's only contention that a part of the net earnings of appellant inured to the benefit of a private individual concerns the payments made from the Sonora Hospital Laboratory and X-ray Company to Dr. Boice and Dr. Anspach. These payments were made during part of the time to a business entity of Dr. Boice and Dr. Anspach, known as Leasing Company of Sonora; however, no difference in the taxability of appellant would result thereby and appellant agrees that such payment can be considered as being made directly to the doctors. For tax purposes all payments made to the Leasing Company of Sonora by the Laboratory and X-ray were considered as personal income to the doctors. (Stip. of Fact No. 19.)

Appellant contends that income received by the Laboratory and X-ray was income of a completely separate business entity and in no way can be considered



income of the appellant, and for that reason, no part of such income can be considered as the net earnings of appellant which inured to the benefit of the doctors.

On the bottom of page 16 of the Tax Court's Opinion, a statement is made that "It is no answer to say that the gross receipts of these facilities were paid to the Rucker Bros. and were technically never part of the hospital's income." (T.C. Opinion p. 16.) Appellant contends exactly the opposite in that if the gross receipts of the Laboratory and X-ray were not part of appellant's income, then any payments from them could not affect in any way appellant's tax exempt status.

The agreement by the Rucker Bros. and Dr. Boice and Dr. Anspach providing for the payment of one-third of the receipts of the Laboratory and X-ray was made on January 9, 1956 and was to run for ten years from that date. The agreement therefore preceded the incorporation of appellant and extended by its terms to a time subsequent to the fiscal years here in question. The agreement was not changed, affected or modified by the incorporation of appellant and it was not until September 25, 1961 that appellant purchased all the business assets and good-will of the Laboratory and X-ray from the Rucker Bros. and thereby terminated any further obligations under the January 9, 1956 contract. (Stip. of Fact No. 18.)

The Laboratory and X-ray were operated as a completely separate business entity by the Rucker Bros. (Findings of Fact p. 5; Stip. of Facts Nos. 6, 9 and 12; Tr. pp. 170-172.)

The Laboratory and X-ray billed and collected for all services rendered to "out-patients" and appellant billed and collected for all services rendered by the Laboratory and X-ray to "in-patients" and remitted all such collections to the Laboratory and X-ray. (Stip. of Fact No. 9.)

The Laboratory and X-ray maintained its own set of books, filed its own tax returns, employed its own personnel and maintained its own bank accounts. (Tr. p. 47.)

This being the case, regardless of the reasons or amounts of money paid out to Dr. Boice and Dr. Anspach, these funds do not represent net earnings of the appellant inuring to the benefit of private individuals. The fact that part of the gross earnings of the Laboratory and X-ray was paid out to someone other than the owner of the Laboratory and X-ray is immaterial as far as the tax exempt status of the appellant is concerned.

The gross receipts of the Laboratory and X-ray are stipulated to and appear on page 18 of the Findings of Fact. All these amounts were included, not as earnings of appellant, but as gross earnings of the Laboratory and X-ray which was never exempt from income taxes and it could thereby distribute those earnings to whomever it pleased and in particular, to Dr. Boice and Dr. Anspach under the January 9, 1956 agreement.

A question may arise as to the reason for the operation of the Laboratory and X-ray as a separate



business entity. The answer can be found in Section 362 and 363 of the California Administrative Code that requires general hospitals in California to contain an X-ray department and a clinical laboratory. (See Appendix A, attached hereto.) Dr. Boice, in his testimony, advised that there was not money available to provide the Laboratory and X-ray for appellant; that appellant was borrowed to its fullest extent and that it was therefore necessary for the Rucker Bros. to continue the ownership and operation of the Laboratory and X-ray to provide the needed equipment, supplies and staff. (Tr. p. 46.)

In retrospect, it may be that when appellant was first organized, it would have been economically advantageous for it to have provided its own laboratory and X-ray facility as it eventually did, upon the purchase from the Rucker Bros. on September 25, 1961; however, appellant contends that it is neither desirable or necessary that the Tax Court or the Appellate Court pass judgment on this kind of an administrative decision long after the decision has been made. The fact is that appellant was financially unable to provide the required Laboratory and X-ray facilities and therefore arrangements with the Rucker Bros. acting as a separate business entity were continued. (Tr. p. 46.)

Appellant introduced testimony to show that Dr. Boice and Dr. Anspach, because of personal services rendered to the Laboratory and X-ray, would have been justified in receiving the amounts paid to them even if the Laboratory and X-ray had been owned

and operated by the appellant and the earnings therefrom were appellant's earnings.

It is customary for Laboratory and X-ray departments to pay approximately twenty-five to fifty percent of their gross receipts for professional services rendered to them by the responsible licensed director. (Tr. pp. 39-42, 180, 183 and 184.)

The Tax Court's answer to the contention that the founding doctors should receive compensation for their services was that the doctors supervising the Laboratory and X-ray departments did not have any special qualifications as pathologists or radiologists and they did not actively operate or supervise the Laboratory. (Tr. pp. 8-11, 17 and 18.)

As the Tax Court noted, California Business and Professions Code Sections 1284 and 1285 (Appendix B) required the Laboratory to have the services of a licensed clinical Laboratory bioanalyst or a licensed physician and surgeon to provide direct and responsible supervision to the Laboratory. (Tr. pp. 78, 79, 169.) It should be noted that these Sections do not require a pathologist. The owners of the Laboratory were neither physicians or bioanalysts and thus were not qualified to be directors. (Tr. p. 169.) The hospital was also required to have a professional person supervising the X-ray department. (Tr. p. 44.) Therefore, the founding doctors and one of the employees of the doctors, a Dr. Howard, performed these services for the Laboratory and the X-ray units and Dr. Boice and Dr. Howard were actually licensed with



the state as the supervisors of the Laboratory. (Tr. pp. 76-83, 178.)

The services were both of a formal and active nature. Dr. Boice, and beginning in 1959 Dr. Howard, signed all documents requiring the signature of the director of the Laboratory. (Tr. pp. 76-83, 178.) The doctors examined X-rays, did fluoroscopy work, examined blood count reports and other laboratory analyses and reports. (Tr. pp. 41, 42.) They actually read X-rays for other doctors as a radiologist would and performed the duties of a radiologist with respect to the X-ray unit. (Tr. pp. 74, 99, 107 and 108.) Also, their work as directors of the Laboratory was not substantially different from what a pathologist-director would do. (Tr. pp. 42, 100, 101 and 105.) Even though as far as the license for the laboratory was concerned, Drs. Boice and Howard were the directors during the years in question, as far as practice was concerned, Dr. Anspach was a co-director. (Tr. p. 85.)

In May, 1960, when the hospital hired a qualified radiologist, the owners of the Laboratory and X-ray were instructed by the doctors to pay the entire one-third of the gross receipts to the hospital rather than to the founding doctors. (Tr. pp. 47 and 48.) This was done despite the fact that the radiologist took over only the X-ray unit supervision. (Tr. pp. 47 and 48.) The radiologist subsequently hired by the appellant received thirty per cent of the gross receipts after his first two or three months. (Tr. p. 48.)

Appellant contends that the Tax Court erred in its Finding to the contrary and in particular its Finding on page 9 that “Neither Dr. Boice nor Dr. Anspach rendered compensable services in the X-ray department as director or otherwise . . .” and on page 10 of the Findings generally to the effect that none of the doctors did any more than “that of any physician who might have sent his patients to the laboratory for tests . . .”; however, appellant strongly urges that these adverse findings are in reality irrelevant to the main issue as to whether the money paid to the doctors by the Laboratory and X-ray were earnings of the appellant.

The facts are clear and uncontroverted as to the derivation of the money paid to the doctors and these facts just cannot be ignored or construed to give them the character and substance of appellant’s earnings.

Some point has been made of other benefits received by Dr. Boice and Dr. Anspach, such as providing a hospital facility for their own patients or in that the appellant was providing space to the Laboratory and X-ray which benefited the doctors; however, the doctors contributed approximately \$250,000.00 to \$275,000.00 in the form of the hospital building, land, and equipment in exchange for promissory notes on which they never attempted collection of interest or principal. (T.C. pp. 6, 7; Tr. pp. 29, 30, 33, 51-56; Findings of Fact 13.)

In addition, Dr. Boice, Dr. Anspach and Dr. Helen, shared all administrative responsibilities of the appellant from 1957 through the years in question with-



out compensation. (Tr. pp. 50-53, 56, 114; Findings of Fact pp. 11 and 12.)

It seems clear that any such benefits have been offset many times over by the services and the assets provided to the appellant without charge by the doctors.

It should be kept in mind that the organization was just getting started at the time of the tax years in question and taking all dealings into consideration there can be no doubt that the doctors were neither attempting nor were actually making a profit from their dealings with the appellant.

The case at bar is similar in many respects to *Olney, et al. v. Commissioner*, 17 T.C.M. 982. In that case, Dr. Olney had his own office in the hospital and occupied three rooms. He moved in on December 15, 1952 and it was not until 1954 that it was decided that he should pay rent for the past two years of use. In addition, the charges of both the doctor and hospital were entered on the same patient card and only one bill was sent to the patient for both services. Receipts representing payments for both the hospital's and the doctor's charges were deposited in their joint account. The operating expenses of both the doctor and the hospital were paid from this same account and the same set of books were used for the first two years. Despite this complete commingling and intertwined relationship, the Tax Court held that the hospital was tax-exempt.

Even if it is assumed arguendo that the doctors in the case at bar did not deserve one-third of the gross

receipts for their services, there can be no doubt that their overall dealings with the appellant, taking into consideration their administrative services and the assets they contributed, were more praiseworthy and less subject to criticism than the dealings of Dr. Olney with his hospital in the *Olney* case.

In contrast to the case at bar is the situation in *Kenner et al. v. Commissioner*, 20 T.C.M. 185 (affirmed 318 F. 2d 632 (1963)) wherein the Tax Court denied the petitioner exempt status, and rightfully so. In *Kenner* between 1944 and 1950, over \$230,000 of the hospital's funds went for the payment of expenses of farms owned by the founder and for his personal living expenses. Between 1950 and 1954, about \$290,000 of the hospital's funds were used for Arizona real estate and other ventures of the founder. The doctor also listed the hospital as one of his personal assets when applying for loans. In addition, there was an indiscriminate commingling of funds in bank accounts arising from fees and charges for medical services made by the hospital and founder alike.

The *Kenner* case is an example of where the net earnings of the hospital were definitely inuring to the benefit of an individual in contrast to the case at bar where the founding doctors lost money in assisting the fledgling hospital to get a start.

It is appellant's position that a careful and accurate determination made on the basis of the stipulated facts and the Tax Court's Findings of Fact and following the above reasoning must conclude that it was error for the Tax Court to hold that the appellant's



tax exempt status was affected by the doctor's receipt of income from the Sonora Hospital Laboratory and X-ray Company.

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**II. IT WAS ERROR FOR THE TAX COURT TO HOLD THAT THE APPELLANT WAS NOT OPERATED EXCLUSIVELY FOR CHARITABLE PURPOSES.**

It is the position of the appellant, that a hospital could be granted the exemption under Section 501 (c) (3), even if it did not render any free service to patients. This is true, because the very nature of a hospital is to render service to those individuals who are sick or injured and in need of medical care. As long as the hospital is not operated for the personal gain of any individual it appears that charges may be made to cover the costs of the hospital operation and the hospital still be considered a "charitable" organization.

This is in line with the rule that the exemption of charities is to be liberally construed. (G. C. M. 21610, 1939-2 Cum. Bull. 103.)

It is interesting to notice some of the definitions of the word "charity" taken from Black's Law Dictionary (Fourth Edition 1951). They are as follows:

1. Accomplishment of some social interest.
2. Advancement of purposes beneficial to public.
3. All which aids man and seeks to improve his condition.
4. Amelioration of persons in unfortunate circumstances.

5. Improvement of man.
6. Improvement of spiritual, mental, social and physical conditions.
7. Physical, mental or moral betterment.
8. Relief of persons in unfortunate circumstances.

The regulations under the Internal Revenue Code of 1954 state that, "The term 'charity' is used in section 501 (c) (3) in its generally accepted legal sense, and is, therefore, not to be construed as limited by the separate enumeration in section 501 (c) (3) of other tax-exempt purposes which may fall within the broad outlines of 'charity' as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged, . . ." (Regulation Section 1.501 (c) (3) (2).)

It is evident from the above definitions that the word "charity" means much more than the providing of free services or materials. It appears more that purpose of the organization or effort is paramount. In the case of a hospital the primary and major purpose is to provide medical treatment to the sick and injured. This certainly can be construed as "relief to the distressed" or the "amelioration of persons in unfortunate circumstances" or the "improvement or betterment of physical conditions."

It is emphasized that in this context whether or not the services are provided free of charge is of little consequence just so the organization is not



operated or motivated for the benefit or enrichment of private interests.

This is recognized by the respondent in Revenue Ruling 56-185, C. B. 1956-1, 202 which is set forth as Appendix C.

An analysis and comparison will be made of each of the requirements of the stated Revenue Ruling with the facts in this case:

1. Paragraph 1 of the ruling requires that the hospital must be organized as a nonprofit charitable organization for the purpose of operating a hospital for the care of the sick.

The Findings of Fact on page 6 and page 2 of the Tax Court Opinion and Stipulated Facts 1, 2, 3 and 10 clearly indicate that the appellant was so established.

2. The sentences of paragraph 2 of the ruling will be discussed individually.
  - a. It must be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay.

Appellant was in its first three years of operation, during the time in question, indebted to the lending agency for the funds used in the construction of the building and to Dr. Boice and Dr. Anspach on the notes executed in their favor for their equity interest in the former proprietary partnership hospital. Patronage and operating results were at best conjectural in the new hospital facilities. Appellant had no endowment and no source of income other than the fees received for services rendered to patients. (Findings of Fact p. 12.)

Under these circumstances, appellant's financial ability to provide free services was very limited, but the appellant did admit and retain charity patients in a very small number of instances. In some instances patients were admitted with the understanding that they would pay less than the full regular charges—usually to the extent that hospital insurance or some other similar plan covered the services rendered. (Findings of Fact p. 12.)

The type of charity services provided by appellant is very significant. If a patient could pay nothing and was eligible for County Hospital care, the patient was generally referred to the County Hospital. (Findings of Fact p. 12; Tr. pp. 58-68 and pp. 115-118.) If a patient had low paying insurance benefits or owned property or was in other ways ineligible for County Hospital care, then appellant accepted the patients on the basis of receiving partial payment. (Findings of Fact p. 12; Tr. pp. 58-68 and pp. 115-118.)

By this arrangement appellant was performing the greatest possible community service. The very poor were eligible for medical care from the County Hospital facility; those able to pay could provide for their own private hospitalization, but the patient who was neither eligible for County Hospital care nor able to pay the entire cost of private care was assisted by appellant. Truly, appellant was providing charity to the extent of its financial ability to a segment of the community who would otherwise be without medical care or find it difficult to obtain. Thus,



appellant was meeting a serious community need in its granting of charity. By this arrangement the greatest number of patients were given medical care—the indigent and eligible at the County Hospital, and those neither eligible nor able to fully pay at the hospital operated by appellant.

- b. It is normal for hospitals to charge those able to pay for services rendered in order to meet the operating expenses of the institution, without denying medical care or treatment to others unable to pay.**

Because appellant had no endowment and no source of income other than fees, it was necessary to control in some the amount of free care provided. In this situation any free care provided must be recovered from charges made to paying patients. Appellant therefore was required to limit free care to the extent of its financial ability. It therefore charged those able to pay and at no time ever refused admission to a charity patient in an emergency. (Findings of Fact p. 12; Tr. pp. 117 and 118.) It is evident appellant did not deny medical care to those unable to pay. It either accepted them as emergency charity patients, part pay patients or referred them to the County Hospital where they could obtain medical care.

- c. The fact that its charity record is relatively low is not conclusive that a hospital is not operated for charitable purposes to the full extent of its financial ability.**

The Tax Court and the respondent have made a point that the amount of charity provided by appellant is not sufficient to be counted. Under the circumstances of appellant's beginning operations in a new and heavily encumbered facility with no endow-

ment or other income funds, one can reasonably expect the amount of free care to be small. Dr. Boice did state that the amount of free care furnished was less than one per cent. (Findings of Fact p. 12; Tr. p. 60.) Let us assume that the free care and part pay care was equal to one per cent of the business. That would be \$3,982.49 for the fiscal year ending March 31, 1959 (Exhibit 1-a); \$3,665.81 for the fiscal year ending March 31, 1960 (Exhibit 2-b); and \$3,524.65 for the fiscal year ending March 31, 1961. Considering that for each one of these fiscal years the taxable income, as revised in the stipulated computation of tax liability, which is a part of the Tax Court decision, was \$49,781.34 for 1959; \$15,216.75 for 1960 and \$12,709.82 for 1961, the amount of charity thus computed is not disproportionate to the financial ability of appellant. It is strongly urged that in view of the recent origin of appellant and its heavy capital indebtedness that these amounts of charity are adequate to meet the intent of the Revenue Ruling and Revenue Code. Additional evidence of the amount of charity provided can be obtained from the Exemption Application filed by appellant on August 21, 1959. (Form 1023; Exhibit 4-d.) That document shows on page 2 that during the last complete year appellant had 12,081 full pay patient days; 340 part pay patient days and 113 charity patient days. It is noted that the free patient days approximate one per cent of the full pay patient days and there are additional part pay patient days. In addition the record book admitted into evidence as appellant's exhibit



numbers 20 and 21 show the number of part pay patient days and charity patient days for the period of April 1959 through September 1959. Other similar records for other periods had been lost.

- d. It may furnish services at reduced rates which are below cost, and thereby render charity in that manner.

Without repeating all that has been stated previously, this provision in the Revenue Rulings appears to exactly conform to the type of charity being rendered most frequently by appellant.

- e. It may also set aside earnings which it uses for improvements and additions to hospital facilities.

During the years in question the appellant was heavily mortgaged for its construction costs and earnings were required to pay the mortgage payments, provide new equipment and establish operating reserves. (Tr. p. 28.)

- f. It must not, however, refuse to accept patients in need of hospital care who cannot pay for such service.

Of course, this requirement must be read in connection with the rest of the ruling. The admission of charity patients must be limited to financial ability. Appellant conformed to the reasonable requirements of this sentence by accepting charity patients in emergencies; arranging for transfer or admission to the County Hospital where eligible and providing for some free and part pay patients as its financial ability allowed.

- g. Furthermore, if it operates with the expectation of full payment from all those to whom it renders service, it does not dispense charity merely because some of its patients fail to pay for the services rendered.

Appellant has not used any of the write-off of bad debts as a part of its recognized charity. Only the free or part pay patients who arranged for charity prior to admission have been included. (Findings of Fact p. 12; Tr. pp. 58, 59, 90, 91, 115-119.) In addition to the charity granted prior to admission, appellant wrote off as bad debts accounts receivable in the amount of \$14,559.21 in fiscal 1959; \$12,226.00 in fiscal 1960 and \$15,082.08 in fiscal 1961. (Respondent's stipulated computation statement attached to the Tax Court Decision.)

There is an implication that the fact appellant turned over unpaid patient accounts, including the portion that part pay patients agreed to pay to a collection agency for the purpose of collection is inconsistent with the operation of a tax-exempt hospital. Since the write-off of bad debts doesn't count to any degree for charity and since the ability to provide charity depends exclusively on the income produced by paying patients, it seems that to neglect to follow through with collection procedures against patients able to pay would tend to reduce the charitable capability of a tax-exempt hospital and could be construed as allowing net income to inure to the benefit of individuals, namely, the non-paying but able to pay patients. For these reasons, it is urged that any such implication be rejected. A tax-exempt hospital must be able to enforce payment from those



able to pay. Any other result would be completely unreasonable, and would render the facility inoperative especially where the only source of income is from fees charged.

3. **It must not restrict the use of its facilities to a particular group of physicians and surgeons, such as a medical partnership or association, to the exclusion of all other qualified doctors.**

Appellant has always operated with an "open" medical staff. At the time appellant acquired the hospital ten doctors were in Sonora, seven were on the medical staff, four of those were in the medical group. At the time of trial (January, 1966) there were about fifteen doctors in Sonora, eleven of whom were on the medical staff and five of those were in the medical group.

4. **Its net earning must not inure directly or indirectly to the benefit of any private shareholder or individual.**

This provision goes to one of the main issues in this case and is discussed at length elsewhere in this brief. Appellant contends that none of its net earnings have inured directly or indirectly to the benefit of any private individual. The Tax Court in *Olney et al. v. Commissioner*, 17 T. C. M. 982, held that the petitioner hospital was operated "exclusively" for charitable purposes. The evidence indicated that \$55,000.00 worth of free service was rendered over a five-year period to 200 in-patients. Services worth \$25,000.00 were rendered to out-patients. It appears during the five years of charity that the hospital's gross income was over \$250,000.00 per year. However,

the Court stated in a footnote that the record did not show the number of patients who received entirely free treatment, nor did it show the per cent of the total charge paid by the patient who paid only a portion of the charge. The Court also stated, "In most cases the patient's ability to pay was determined after the services had been performed." Therefore, it appears that much of the "charity" was really uncollectible debts.

In the case at bar, it does not appear that appellant's charity record was substantially different than the hospital in *Olney*.

Taking into consideration the fact that some of the "charity" in *Olney* was evidently uncollectible accounts and the charity in the case at bar was agreed to in advance (Tr. p. 58), there is little difference between the charity records in *Olney* and the case at bar. Also, there was no evidence of any absolutely free services in *Olney*, whatsoever. The Court in deciding *Olney* cited *Commissioner v. Battle Creek*, 126 F. 2d 405 (1942) for the proposition that "So long as admission and treatment to the hospital in question are not denied to those unable to pay, an institution is classed as charitable." Patients were never refused emergency care by appellant, whether they could pay or not. (Tr. p. 117.) Admittedly, some patients seeking admission were referred to the county hospital, while others considered deserving were either given free care or reduced-rate care. (Tr. pp. 57, 58, 115-117.)

This practice of referring some to county hospital should not be considered "denying treatment to those



unable to pay," for it is common knowledge that most tax exempt hospitals follow this practice, and render relatively small amounts of free services and it is respectfully requested that the Honorable Court take judicial notice of these facts.

The matter of which a Court will take judicial notice must be a subject of common and general knowledge. *Waters-Pierce Oil Co. v. Deselins*, 212 U.S. 159 (1905). Those matters familiarly known to the majority of mankind are properly within the concept of judicial notice. *Leach v. Burr*, 188 U.S. 510 (1902).

It is also common knowledge that usually the only place to receive free hospital care is in a County Hospital and this fact also should be judicially noticed. During each of the three years in question, either no-pay or part-pay patients were admitted. (Tr. pp. 114-119).

Mr. Floyd Moses, the business manager of appellant testified as to the charity rendered to patients during the period in question on the direction of the hospital administrator. He testified as to the record books where entries of such charity were made. (Tr. pp. 141-157). Actual examples of appellant's charity were presented by Mr. Leo Laramy who testified as to the care that was furnished him by the appellant without charge and also the free care that was furnished a patient by the name of Mrs. Hershurt. (Tr. pp. 127-134).

Based upon the above stated facts and the reasonable interpretation of those facts, it is strongly urged that the Court determine that it was error for the Tax

Court to hold that the appellant was not operated exclusively for charitable purposes.

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### CONCLUSION

The Tax Court in its opinion on page 16 refuses to specify any of the points raised by respondent as "the crucial factors" and even declines to rule whether the arrangement with the Rucker Bros. is a diversion of appellant's income, and then states that in the aggregate the considerations establish that appellant is not operated exclusively for charitable purposes.

If not one of the factors involved in this proceeding would render appellant ineligible to receive tax-exempt status, then it is contended that a multiplication of innocent factors can in no way be accumulated to produce a finding of ineligibility for tax-exempt status.

Why could not the Tax Court single out any one consideration or factor and why couldn't it precisely rule concerning the payments from the Laboratory and X-ray to the doctors? There is only one answer. None of the single factors or considerations nor the arrangement with the Rucker Bros. would establish appellant's non-charitable purpose.

This is not a difficult or complicated case. Only two questions are raised. The first has to do with the payment from the Laboratory and X-ray to Dr. Boice and Dr. Anspach. The answer is simple. The appellant hospital required an X-ray department and a clinical laboratory. It had no funds to equip and operate its



own and the Rucker Bros. continued to own and operate the two facilities as a separate entity. Their income had nothing to do with the hospital income. Payment of their own income to Dr. Boice and Dr. Anspach can in nowise be construed to be a diversion of appellant's earnings. The uncontroverted testimony of Dr. Boice and Dr. Anspach affirms that no payments of any kind were ever made to them by appellant, not even for their administrative services or on the obligation originally due them. They forgave the obligation and performed the administrative services free. Therefore, no part of the net earnings of appellant inured to the benefit of any private shareholder or individual.

The second question concerns the charitable operation of appellant. Having analyzed respondent's own Revenue Ruling sentence by sentence, the conclusion seems clear. Appellant was organized and did operate exclusively for charitable purposes within the intent of Internal Revenue Code Section 501 (c) (3).

This writer is a member of the Board of Directors of four tax-exempt hospitals. Appellant's operations with regard to free care is not dissimilar to any other presently tax-exempt hospital in the writer's knowledge. As a matter of fact, with the advent of Medicare and Medi-Cal there is virtually no free medical care to be provided. It is virtually all paid under some government sponsored social program or by private and group insurance.

There is an ironic twist to this present action. Appellant's tax-exempt status has now been reinstated

effective after the reorganization of 1961. Any final tax imposed will therefore necessarily have to be paid from assets now held by a tax-exempt hospital and not from any assets that have allegedly been improperly diverted.

For all of the foregoing reasons it is respectfully urged that the decision of the Tax Court be reversed and that a decision be made holding that for the years in question appellant was organized and operated as a tax-exempt charitable organization within the provision of Internal Revenue Code Section 501 (c) (3) and that the revocation of the exempt status be annulled.

Dated, San Jose, California,  
February 21, 1968.

Very respectfully yours,  
ANDERSON AND MORGAN,  
By ALVIN L. ANDERSON,  
*Attorneys for Appellant.*

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I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ALVIN L. ANDERSON

(Appendices A, B and C Follow.)



## **Appendices A, B and C**



## Appendix A

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### CALIFORNIA ADMINISTRATIVE CODE

362. Radiology. (a) General hospitals and tuberculosis hospitals shall maintain a radiology department with diagnostic and fluoroscopic facilities. Shielding and space to assure safe handling of patients and protection of personnel while taking films shall be provided.

(b) General hospitals of 100 beds or more shall maintain facilities for deep and superficial therapy. This may not be required if it can be demonstrated to the department that such facilities are available in the community.

(c) Tuberculosis nursing homes shall provide a fluoroscope if pneumothorax or pneumoperitoneum is done in the institution. Diagnostic X-ray facilities shall be readily accessible in the community.

363. Laboratory. Laboratories shall be operated in conformance with California Business and Professions Code, Division 2, Chapter 3, Sections 1200 to 1322, and California Administrative Code, Title 17, Chapter 2, Subchapter 1, Group 2, Sections 1030 to 1050.

(a) General hospitals of less than 100 beds, and tuberculosis hospitals and sanatoria shall maintain a laboratory for emergency laboratory work, such as urinalysis, complete blood counts, hemoglobin, blood typing, cross matching, and other necessary work in the community. If reasonable laboratory facilities are not readily available, the hospital shall be staffed and

equipped to carry out all laboratory procedures, except in rare and unusual circumstances where other facilities or personnel may be required.

(b) General hospitals of 100 beds or more shall maintain laboratory facilities and equipment for chemical, bacteriological, seriological, pathological, and hematological services. All laboratory procedures shall be done in the hospital, except in rare and unusual circumstances where other facilities or personnel may be required.



## Appendix B

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### CALIFORNIA BUSINESS AND PROFESSIONS CODE

1284. It is unlawful for any person to conduct, maintain, or operate a clinical laboratory unless such clinical laboratory is under the direct and responsible supervision and direction of one of the following:

- (a) A licensed clinical laboratory bioanalyst.
- (b) A physician and surgeon licensed under the chapter on medicine of this code.

1285. It is unlawful for a licensed clinical laboratory bioanalyst or physician and surgeon to serve only as the nominal director or supervisor of a clinical laboratory.

## Appendix C

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### REV. RULING 185, 1956-1 CUM. BULL. 203

In order for a hospital to establish that it is exempt as a public charitable organization within the contemplation of section 501(c) (3), it must, among other things, show that it meets the following general requirements:

1. It must be organized as a nonprofit charitable organization for the purpose of operating a hospital for the care of the sick. A nonprofit hospital chartered only in general terms as a charitable corporation can meet the test as being organized exclusively for charitable purposes. See *Commissioner v. Battle Creek, Inc.* 126 F.2d 405.

2. It must be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay. It is normal for hospitals to charge those able to pay for services rendered in order to meet the operating expenses of the institution, without denying medical care or treatment to others unable to pay. The fact that its charity record is relatively low is not conclusive that a hospital is not operated for charitable purposes to the full extent of its financial ability. It may furnish services at reduced rates which are below cost, and thereby render charity in that manner. It may also set aside earnings which it uses for improvements and additions to hospital facilities. It must not, however, refuse to accept patients in need of hospital care who cannot pay for such services. Furthermore, if it operates with the expectation of full payment from all those to whom it renders services, it does not dispense

charity merely because some of its patients fail to pay for the services rendered.

3. It must not restrict the use of its facilities to a particular group of physicians and surgeons, such as a medical partnership or association, to the exclusion of all other qualified doctors. Such limitation on the use of hospital facilities is inconsistent with the public service concept inherent in section 501 (c) (3) and the prohibition against the inurement of benefits to private shareholders or individuals. It is recognized, however, that in the operation of a hospital there must of necessity be some discretionary authority in the management to approve the qualifications of those applying for the use of the medical facilities. The size and nature of facilities may also make it necessary to impose limitations on the extent to which they may be made available to all reputable and competent physicians in the area.

4. Its net earnings must not inure directly or indirectly to the benefit of any private shareholder or individual. This includes the use by or benefit to its members of its earnings by way of a distribution of profits, the payment of excessive rents or excessive salaries, or the use of its facilities to serve their private interests. If provision is made in the bylaws for dividends, exemption will not be allowed even though no dividends have been declared. Exemption will not be defeated, however, merely because the shareholders or members might possibly at some future date share in the assets upon dissolution in the absence of a case of mala fides where there appears to be a plan on the part of the shareholder or individual to acquire assets on the dissolution of the corporation.







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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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SONORA COMMUNITY HOSPITAL, a corporation,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

---

ON PETITION FOR REVIEW OF THE DECISION OF THE  
TAX COURT OF THE UNITED STATES

---

BRIEF FOR THE RESPONDENT

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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No. 21,642

SONORA COMMUNITY HOSPITAL, a corporation,  
Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,  
Respondent

---

ON PETITION FOR REVIEW OF THE DECISION OF THE  
TAX COURT OF THE UNITED STATES

---

BRIEF FOR THE RESPONDENT

---

OPINION BELOW

The findings of fact and opinion of the Tax Court (I-R. 32-49)<sup>1/</sup>  
are reported at 46 T.C. 519.

JURISDICTION

This petition for review (I-R. 59-61) involves federal income  
taxes for the taxable years 1959, 1960 and 1961. On October 31,  
1963, the Commissioner of Internal Revenue mailed to the taxpayer  
a notice of deficiency asserting deficiencies in income tax in the

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<sup>1/</sup> "I-R." references are to volume I of the record on appeal.  
"II-R." references are to volume II of the record on appeal.

aggregate amount of \$35,791.80. (I-R. 5-9.) Within 90 days thereafter, on January 27, 1964, the taxpayer filed a petition (I-R. 1-9) with the Tax Court for a redetermination of the deficiencies asserted for the taxable years 1959, 1960 and 1961 under the provisions of Section 6213 of the Internal Revenue Code of 1954. The decision of the Tax Court was entered on September 19, 1966. (I-R. 57-58.) This case is brought to this Court by petition for review filed on December 19, 1966 (I-R. 59-61) within the three-month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

#### QUESTION PRESENTED

Whether the Tax Court erred in holding that taxpayer was not operated exclusively for charitable purposes and consequently failed to qualify for exemption from income tax under Section 501(c)(3) of the 1954 Code.

#### STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

\*

\*

\*

(c) List of Exempt Organizations.--The following organizations are referred to in subsection (a):

\*

\*

\*

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the

prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

\*

\*

\*

(26 U.S.C. 1964 ed., Sec. 501.)

Treasury Regulations on Income Tax (1954 Code):

§ 1.501(c)(3)-1 Organizations organized and operated for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.

\*

\*

\*

(c) Operational test--(1) Primary activities. An organization will be regarded as "operated exclusively" for one or more exempt purposes only if it engages primarily in activities which accomplish one or more of such exempt purposes specified in section 501(c)(3). An organization will not be so regarded if more than an insubstantial part of its activities is not in furtherance of an exempt purpose.

\*

\*

\*

(26 C.F.R., Sec. 1.501(c)(3)-1.)



### STATEMENT

The facts as stipulated by the parties and as found by the Tax Court (I-R. 33-44) may be stated as follows:

Taxpayer is a corporation organized on or about March 21, 1958, under the laws of the State of California. During the periods here at issue, taxpayer was engaged in the business of owning and operating a 42-bed general hospital at One South Forest Road, Sonora, California. For federal income tax purposes, taxpayer filed a Return of Organization Exempt From Income Tax (Form 990-A) for each of its fiscal years ending March 31, 1959, 1960 and 1961, with the District Director of Internal Revenue at San Francisco, California. (I-R. 33.)

In 1950, Ben R. Boice, a medical doctor, established a medical practice in Sonora, a town of about 2,500 inhabitants which serves a county (Tuolumne) having a population of about 18,000. He became a member of the staff at the Columbia Way Hospital in Sonora. There were then two other hospitals in the town, the Sonora Hospital and the Tuolumne County Hospital.

Dr. Boice had a "sort of a courtesy staff membership" at the Sonora Hospital, but none at the County Hospital. The Sonora Hospital was housed in a small, old building, having 13 beds. It was located on Washington Street, the main street in Sonora. Its owner, Dr. Wrigley, died around 1950, and it was thereafter closed as a hospital. Dr. Boice purchased the property from Dr. Wrigley's widow in 1953 for use as an office. (I-R. 33-34.)



Paul L. Anspach is a medical doctor who had come to Sonora shortly before 1954. In January, 1954, he and Dr. Boice formed a partnership to practice medicine in Sonora. The partnership offices were located on the main floor of the old Sonora Hospital building which, as noted above, had been purchased by Dr. Boice; the upper floor was shut off and the bottom floor was used for storage. (I-R. 34.)

At some time prior to 1956, Drs. Boice and Anspach began to have difficulties with the Columbia Way Hospital and they were "virtually tossed out of" that hospital. In order to continue to practice medicine in Sonora it became imperative for them to obtain some other hospital connection. Accordingly, in January, 1956, they reopened and began to operate the old Sonora Hospital. They increased its capacity to 21 beds. It was their intention at that time to build a more adequate and modern hospital facility in Sonora. The State of California issued a temporary one year permit to Drs. Boice and Anspach to reopen and operate the old Sonora Hospital, pending completion of a new hospital, and they operated the hospital as a partnership under the name "Sonora Hospital". (I-R. 34-35.)

Drs. Boice and Anspach attempted unsuccessfully to interest various persons and organizations in undertaking the building, financing and operation of a new community hospital in Sonora. However, they were able to obtain on their own behalf a loan of \$200,000 from the Small Business Administration of the United States and with this money, and additional sums advanced by them as individuals, they purchased a parcel of realty located at

One South Forest Road in Sonora and constructed a 42-bed hospital thereon. This hospital was completed on July 7, 1957. (I-R. 35.)

Upon completion of the new hospital at One South Forest Road, Drs. Boice and Anspach closed their hospital operation at Washington Street and moved it to the new location. However, at that time they continued to maintain their office in the old Sonora Hospital building. In 1959, they placed a new building adjacent to the hospital building at One South Forest Road and moved their offices into this new building. (I-R. 35.)

On January 9, 1956, at about the time the old Sonora Hospital was reopened, Drs. Boice and Anspach entered into an agreement with two brothers, Jack and James C. Rucker, both of whom are registered "technologists", whereby the Ruckers were to operate laboratory and X-ray facilities at the Sonora Hospital or such other hospitals as might be established by Drs. Boice and Anspach during the term of the agreement, which was to be ten years. (I-R. 35-36.)

The January 9, 1956 agreement provided that the Ruckers were to establish, equip, staff, and maintain laboratory and X-ray facilities in quarters provided in the hospital by Drs. Boice and Anspach. Further, Drs. Boice and Anspach were to make use of the laboratory and X-ray facilities so established exclusively for all laboratory and X-ray work required by them in their practice or in connection with the operation of the hospital. Also, Drs. Boice and Anspach were to bill and collect all charges in



respect of laboratory and X-ray work on in-patients and remit these collections to the Ruckers. Work on out-patients was to be billed directly by the Ruckers. In consideration for the above, the Ruckers agreed to pay to Drs. Boice and Anspach one-third of the total gross receipts derived from the operation of the laboratory and X-ray departments. The doctors were not required to perform any services under the terms of the agreement with respect to the operation of either the laboratory or the X-ray department. (I-R. 36.)

Pursuant to the agreement of January 9, 1956, the Ruckers operated the two departments, namely, the laboratory and the X-ray facility, as a separate trade or business in partnership form under the name of Sonora Hospital Laboratory and X-ray Company. The services thus rendered consisted of the operation of a general X-ray department and a clinical laboratory; the work of the laboratory involved making blood counts, cholesterol counts, urinalyses, etc. However, neither the Sonora Hospital Laboratory and X-ray Company, nor Drs. Boice and Anspach made pathological examinations of tissue; such work was sent out to a pathologist. (I-R. 36-37.)

Upon moving into the new hospital on July 7, 1957, Drs. Boice and Anspach assigned approximately 1,000 square feet of floor space in the new building to the Ruckers for installation of their laboratory and X-ray equipment. The Ruckers moved into the new building and continued performing in accordance with the January 9,

1956 agreement. At this time, the Ruckers completely re-equipped the laboratory and X-ray facilities at their own expense.

(I-R. 37.)

On or about March 21, 1958, Drs. Boice and Anspach caused the incorporation of taxpayer under the name of Boice-Anspach Foundation, pursuant to the General Non-Profit Corporation Law, Part 1 of Division 2 of Title 1 of the Corporation Code of the State of California. Subsequently, on or about June 11, 1958, taxpayer changed its name to Sonora Community Hospital. (I-R. 37.)

On or about March 31, 1958, Drs. Boice and Anspach sold their partnership interests in the hospital located at One South Forest Road to taxpayer for a net consideration of approximately \$251,180. In consideration for these assets, taxpayer gave Drs. Boice and Anspach 20 promissory notes bearing interest at six percent and payable over a period of years beginning in 1968. (I-R. 37-38.)

Subsequent to the transfer of the hospital to taxpayer the Ruckers continued to operate the laboratory and X-ray departments in the same fashion as when the doctors owned the hospital. Up until about May 26, 1958, they continued to remit one-third of the gross receipts derived from the operation of these facilities directly to Drs. Boice and Anspach. On or about May 26, 1958, Drs. Boice and Anspach directed the Ruckers to pay the one-third share of the gross receipts to Leasing Company of Sonora, a corporation wholly owned by these doctors. They had caused it to



be incorporated about December 2, 1957, and were its sole stockholders at all times pertinent. (I-R. 38.)

The Ruckers complied with this directive. Leasing Company of Sonora did not rent any equipment or property to either taxpayer or Sonora Hospital Laboratory and X-ray Company. About two-thirds of all the fees collected were attributable to the operation of the X-ray department and the remaining one-third to the laboratory. (I-R. 38.)

In October, 1959, Drs. Boice and Anspach directed the Ruckers to pay taxpayer \$100 per month out of their one-third share of the gross receipts derived from the laboratory and X-ray facilities and to continue to pay the balance of that share to Leasing Company of Sonora. In May, 1960, Drs. Boice and Anspach directed the Ruckers to pay the entire one-third share to taxpayer. (I-R. 38.)

The Sonora Hospital Laboratory and X-ray Company billings and payments for both out-patients and in-patients for the calendar years 1958, 1959, 1960, and the period January 1, 1961 through September 30, 1961 were as follows (I-R. 39):

	<u>Billings</u>		<u>Payments</u>	
	<u>Out-Patients</u>	<u>In-Patients</u>	<u>Out-Patients</u>	<u>In-Patients</u>
1958	\$37,482.84	\$47,903.63	\$35,139.24	\$43,237.15
1959	39,308.72	51,121.66	36,453.46	38,382.98
1960	48,885.60	52,747.75	43,114.36	42,580.19
1/1/61-				
9/30/61	38,382.98	33,158.22	34,374.72	42,795.99

During taxpayer's fiscal years ended March 31, 1959, 1960 and 1961, the Ruckers paid \$25,121.07, \$23,135.82, and \$1,898.32, respectively, to Leasing Company of Sonora as directed by Drs. Boice and Anspach. Leasing Company of Sonora used these monies to make investments not related in any way to taxpayer's operations. (I-R. 39.)

During the years here in issue, the State of California had no licensing provisions concerning X-ray technicians or the operation of X-ray equipment, and the Ruckers were empowered under California law to operate and in fact did operate the X-ray department in the hospital without any supervision by a physician. Although an X-ray department in a hospital is usually under the supervision of a radiologist (a physician who specializes in the interpretation of X-ray films and in the performance of fluoroscopic examinations) or other qualified medical doctor, neither Dr. Boice nor Dr. Anspach in fact supervised that department. Neither was a radiologist. Each would perform fluoroscopic examinations of his own patients and each would examine X-ray films taken by the Ruckers of his own patients, but such examinations were merely those which any physician might make in respect of his own patients who were sent to the X-ray department, rather than those which would be made by the director or other qualified supervising physician in the X-ray department. In 1961, taxpayer hired a qualified radiologist, Dr. Robert Powell, to take charge of the radio-



logical services. He performed fluoroscopy work and reviewed X-rays taken in his department, submitting a written report to the attending physician. His work in that respect differed markedly from the examinations that Drs. Boice and Anspach might make in respect of their own patients or in connection with an occasional case in which some other physician might solicit their opinion in respect of a particular patient. Neither Dr. Boice nor Dr. Anspach rendered compensable services in the X-ray department as director or otherwise; any services performed by either of them in relation to X-rays were those that might be rendered by any practicing physician unconnected with the operation of the X-ray department. (I-R. 39-40.)

The situation in respect of the laboratory was somewhat different from that of the X-ray department. California law required that the laboratory be "under the direct and responsible supervision and direction of" a licensed clinical laboratory bioanalyst or a licensed physician and surgeon. Section 1284, California Business and Professions Code. Since neither of the Ruckers qualified under either of these categories, Dr. Boice signed the required application for the license to operate the laboratory, and became in name the director of the laboratory. Dr. Boice continued in this capacity from January 9, 1956 until sometime in 1959. However, all work in the laboratory was done by the Ruckers or under their supervision. (I-R. 40-41.)

Under Section 1285 of the California Business and Professions Code it "is unlawful for a licensed \* \* \* physician and surgeon to serve only as the nominal director or supervisor of a clinical

laboratory." Although reports issued by the laboratory were signed in Dr. Boice's name, there is no convincing evidence in this record that he actually supervised or directed the operation of the laboratory to any appreciable extent, if at all. Nor does it appear that Dr. Anspach ever acted as director of the laboratory either in fact or nominally. To the extent that Dr. Boice might have questioned the results of any tests performed by the laboratory in respect of any of his patients and required the tests to be repeated, the situation was no different from that of any physician who might have sent his patients to the laboratory for tests; such action by him did not in any manner represent the supervision or direction of the operation of the laboratory. In 1959, Dr. Theodore C. Howard, an employee of Drs. Boice and Anspach, signed the license application as director of the laboratory. Although the medical director of a clinical laboratory is often a physician specializing in pathology, and may receive between 30 and 40 percent of the gross receipts of the laboratory, it does not appear that either Dr. Boice or Dr. Howard had any special qualifications as a pathologist or that Dr. Howard was in fact any more active than Dr. Boice in the actual operation or supervision of the laboratory. (I-R. 41-42.)

There were several other doctors associated with Drs. Boice and Anspach in the practice of medicine; they all occupied the same offices and all of them are sometimes referred to herein in



the aggregate as the "medical group". There were about ten doctors in Sonora when taxpayer acquired the hospital from Drs. Boice and Anspach. Seven of them were on the hospital staff, and four of the seven were members of the medical group. At the time of trial herein (January 1966) there were about fifteen doctors in Sonora, eleven of whom were on the hospital staff and five in the medical group. About 90 per cent of taxpayer's patients were patients of members of the medical group. (I-R. 42.)

Dr. Anspach's wife, Helen, is a physician, and during the tax years served as administrator of the hospital without compensation. Drs. Boice and Anspach also performed various administrative services in the operation of the hospital for which they were not compensated. (I-R. 42-43.)

Taxpayer had no endowment and no source of income other than the fees received for services rendered to patients. It had no written rules or regulations regarding the admission of charity patients, and it did not ordinarily admit charity patients. Its practice was to refer charity patients to the County Hospital, and on occasion when a charity patient was admitted in an emergency it would have him transferred when circumstances permitted to the County Hospital. It did admit and retain charity patients in a small number of instances. The total amount of free care furnished was less than one percent of paid care. In some instances patients were admitted with the understanding that they

would pay less than the full regular charges--usually to the extent that hospital insurance or some other similar plan covered the services involved. Unpaid patient accounts were turned over to a collection agency, including amounts part-pay patients had agreed to pay. During the period March, 1959 to January 1, 1961, taxpayer turned over \$34,721.72 of unpaid patient accounts for collection. (I-R. 43.)

On or about August 14, 1959, taxpayer filed an exemption application with the Commissioner, requesting exemption from federal income taxes as a corporation organized and operated exclusively for charitable purposes within the meaning of Section 501(a) and 501(c)(3) of the Internal Revenue Code of 1954. (I-R. 43-44.)

On this application form, and in its subsequent correspondence with the Commissioner concerning the application, taxpayer made no mention of the participation by Drs. Boice and Anspach in the gross receipts derived from the laboratory and X-ray operations conducted on its premises. (I-R. 44.)

On February 29, 1960, the Commissioner ruled that taxpayer was exempt as an organization described in Section 501(c)(3) of the Internal Revenue Code of 1954 on the basis that taxpayer had shown that it was organized and operated exclusively for charitable purposes. This ruling was made effective beginning April 1, 1958.



On December 26, 1962, the Commissioner revoked this ruling of February 29, 1960. (I-R. 44.)

In 1961, after the last of the three fiscal tax years involved herein, the articles of incorporation and bylaws of taxpayer were completely amended and it became an integrated institution wholly operated by the Seventh-day Adventist Church. In connection with the absorption of the hospital by the Church, Drs. Boice and Anspach forgave payment on the notes (including all accrued interest) which they had received upon transferring the hospital assets to taxpayer. (I-R. 44.)

The Tax Court upheld the Commissioner's retroactive revocation, holding that the taxpayer was not a charitable corporation exempt from tax under Section 501(c)(3) on the ground that it was not operated exclusively for charitable purposes. (I-R. 14-15, 18.)

From that action, the taxpayer has filed and prosecuted the instant petition for review.

### SUMMARY OF ARGUMENT

Taxpayer, a hospital, claimed exemption from income tax as a charitable corporation for the taxable years in issue (1959-1961). Pursuant to Section 501(c)(3) of the 1954 Code, taxpayer was required to show, among other things, that it was operated exclusively for charitable purposes. The record developed in the Tax Court, however, indicated that taxpayer's charitable activities were insubstantial while its operations benefited to a substantial extent the private interests of the two medical doctors who were its founders. Accordingly, the Tax Court, viewing the picture whole, inferred from what taxpayer actually did that its operation was not exclusively for charitable purposes and that its claim for exemption consequently should be denied.

On this appeal, the strategy of taxpayer is to isolate each element considered material by the Tax Court and to attempt a demonstration that any one of them, standing alone, would not justify denial of exempt status. A principal difficulty confronting taxpayer is that the Supreme Court has interpreted the word "exclusively" in a similar context to mean that a single nonexempt purpose, if substantial in nature, destroys the claim to exemption. It follows that the Section 501(c)(3) requirement of operation for exclusively charitable purposes requires a balancing of the charitable aspects of the operation against any private benefit in a factual inquiry as to what the taxpayer's real purposes are. No single element need be determinative. The ultimate inference drawn by the Tax Court has a rational



foundation in its subsidiary findings, all of which are supported by substantial evidence, representing, in some cases, its resolution of conflicts in the testimony.

The decision of the Tax Court is correct and should be affirmed.

#### ARGUMENT

THE TAXPAYER DID NOT QUALIFY AS AN EXEMPT  
CHARITABLE CORPORATION UNDER SECTION 501  
(c)(3) OF THE 1954 CODE BECAUSE IT WAS NOT  
OPERATED EXCLUSIVELY FOR CHARITABLE PURPOSES

The taxpayer in this case claims to be a charitable corporation exempt from tax during the years in issue under Section 501(c)(3) of the Internal Revenue Code of 1954, supra. A corporation is entitled to be exempt from tax under Section 501(c)(3) if it meets the following requirements: (1) it must be organized and operated exclusively for charitable purposes; (2) no part of its net income may inure to the benefit of a private individual or shareholder; (3) it cannot engage in substantial political or lobbying activities.

The sole question presented by this appeal is whether the Tax Court correctly determined that the taxpayer was not entitled to tax-exempt status under Section 501(c)(3) on the ground that it was not operated exclusively for charitable purposes. The Treasury Regulations under Section 501(c)(3)<sup>2/</sup> set forth an "operational test" for the purpose of determining whether a corporation claiming a tax-exempt status is being operated exclusively for the exempt

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<sup>2/</sup>Treasury Regulations on Income Tax (1954 Code), Section 1.501(c)(3)-1(c)(1), supra.

purpose. Under those Regulations, a corporation claiming to be operated exclusively for an exempt purpose must be engaged primarily in activities which accomplish that purpose and not more than an insubstantial amount of its activities may be in furtherance of nonexempt purposes. Treasury Regulations on Income Tax (1954 Code), Section 1.501(c)(3)-1(c)(1), supra. These requirements are merely declaratory of existing case law interpreting the term "operated exclusively" as used in Section 501(c)(3). Stevens Bros. Foundation, Inc. v. Commissioner, 324 F. 2d 633 (C.A. 8th), certiorari denied, 376 U.S. 969; Duffy v. Birmingham, 190 F. 2d 738 (C.A. 8th). See also Better Business Bureau v. United States, 326 U.S. 279, and United States v. Fort Worth Club, 345 F. 2d 52 (C.A. 5th), modified and reaffirmed per curiam, 348 F. 2d 891. Although the Better Business Bureau case involved an exemption from social security taxes, the language of the exempting clause was similar to Section 501(c)(3). In the oft-quoted words of that opinion (p. 283), "This ["exclusively"] plainly means that the presence of a single noneducational purpose, if substantial in nature, will destroy the exemption \* \* \*".

The essentially factual inference drawn by the Tax Court -- that taxpayer was not operated exclusively for exempt purposes -- is supported not only by the evidence that taxpayer's charitable activities were insubstantial, but also by the evidence that in some respects it served the private interests of the two medical doctors who were its founders. The method of the Tax Court here was to balance all of these aspects against each other to arrive



at an overall picture of the operational purposes of taxpayer.

Although taxpayer attempts, on this appeal, to isolate each aspect of the elements deemed material by the Tax Court and argues that any one of them, standing alone, does not bar exempt status, it should be clear that the Tax Court's approach is necessitated by the terms of Section 501(c)(3).

Turning first to taxpayer's claimed public purpose, the evidence shows only an insubstantial amount of charitable activity. Taxpayer never in fact held itself out as a charitable organization. It had no rules or regulations or any other printed material setting forth charitable programs or policies. (II-R. 57-58.) Moreover, one of the taxpayer's founders testified that the taxpayer usually refused patients without funds, referring them to the County Hospital. (II-R. 58, 59-60, 115.) While the founder testified that some patients were admitted for reduced rates, he admitted that less than one percent of the care furnished by the taxpayer was without charge. (II-R. 60.) Assuredly, the charity record of a charitable hospital may be low, depending upon all the facts. Cf. Commissioner v. Battle Creek, 126 F. 2d 405 (C.A. 5th); Rev. Rul. 56-185, 1956-1 Cum. Bull. 202. The charitable activities must, however, rise above the de minimis level. Cf. Lorain Avenue Clinic v. Commissioner, 31 T.C. 141, 161; Duffy v. Birmingham, supra; Stevens Bros. Foundation, Inc. v. Commissioner, supra. Since the charitable activities of the taxpayer here did not arise above that level it is clear that the taxpayer was not engaged primarily in activities which accomplish the claimed charitable

purposes as is required under the "operational test" set forth in the Regulations.

Viewed from the other end, it appears that taxpayer's operation substantially benefited its founders, who were able to send their patients there after losing their connection with the Columbia Way Hospital. (I-R. 34-35.) More graphically, the two founding medical doctors allocated 1,000 square feet of space in the Sonora Hospital building (owned by the taxpayer) to two private individuals for the purpose of operating an X-ray department and clinical laboratory. (I-R. 37.) The founders had an agreement with these individuals whereby the former would receive one-third of the gross receipts of the X-ray department and clinical laboratory. (I-R. 36, 47-48.) During the years in issue, the proprietors of the X-ray department and laboratory, pursuant to this arrangement paid the founders of the taxpayer approximately \$50,000.<sup>3/</sup> (I-R. 39.) Taxpayer argues (Br. 8-12) that the founding doctors actually performed valuable services for which they received the amounts in question. However, as noted by the Tax Court, this is not borne out in the record. (II-R. 36, 50, 85-86, 120, 122, 164-167.)

The Tax Court stated in this regard (I-R. 48-49):

Petitioner attempts to justify the arrangement on the ground that the one-third gross receipts thus paid over were for services rendered. The answer, however, is simple, namely, that the contract between Drs. Boice and Anspach and the Ruckers did not call for the performance of any services by the doctors,

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<sup>3/</sup>Technically this amount was paid to the Leasing Company of Sonora; however, this corporation was wholly owned by the founders of the taxpayer. (I-R. 38.)



and in any event, we do not believe that any services of consequence were rendered calling for payments in the amounts involved. Certainly, in respect of the X-ray department, which accounted for about two-thirds of the receipts, we cannot find on this record that prior to the advent of Dr. Powell in 1961 either Dr. Boice or anyone associated with him rendered any services of consequence to that department. \* \* \* And even as to the clinical laboratory, the evidence convincingly indicates that Dr. Boice, and later Dr. Howard, served merely as the nominal director without any actual supervision over its activities. Although the burden was upon petitioner, the questioning of Dr. Boice in an effort to pinpoint just what he did in relation to the laboratory brought forth no clear answers showing any real supervision over the laboratory.

The insubstantial nature of the charitable activities of the hospital operated by the taxpayer, coupled with the undeniable private benefits to its founders, are sufficient to support the Tax Court's inference that taxpayer was not operated exclusively <sup>4/</sup> for charitable purposes within the meaning of Section 501(c)(3).

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<sup>4/</sup> The Tax Court reserved judgment on the question of whether the substantial and recurring amounts received by taxpayer's founders during the years in issue amounted, in substance, to "rent" which taxpayer should have received for its space occupied by the X-ray operation and clinical laboratory (I-R. 47) and whether some part of taxpayer's net earnings inured to the benefit of its founders. If that view had been taken by the Tax Court -- and this record fully supports the conclusion that at least part of such amounts was "rent" -- then taxpayer would be disqualified by the requirement of Section 501(c)(3) that "no part of the net earnings \* \* \* inures to the benefit of any private shareholder or individual." The earnings of a corporation may inure to the benefit of a private individual in an indirect as well as in a direct manner. See Horace Heidt Foundation v. United States, 170 F. Supp. 634 (Ct. Cl.); Wells & Wade, Inc. v. United States, 280 F. 2d 825 (Ct. Cl.); Northwestern Municipal Assn. v. United States, 99 F. 2d 460 (C.A. 8th).

Accordingly, the Tax Court's determination that the taxpayer was not entitled to exemption from income tax under Section 501 (c)(3) similarly is correct.

CONCLUSION

For the reasons stated, the decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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Washington, D.C. 20530.

APRIL, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: \_\_\_\_\_ day of \_\_\_\_\_, 1968.

\_\_\_\_\_  
Attorney



JUL 1 1968

No. 21,642

IN THE

**United States Court of Appeals  
For the Ninth Circuit**

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SONORA COMMUNITY HOSPITAL, a California corporation,	} <i>Appellant,</i>
VS.	
COMMISSIONER OF INTERNAL REVENUE,	} <i>Respondent.</i>

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**APPELLANT'S REPLY BRIEF**

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JUN 21 1968

WILLIAM B. LUCK, CLERK





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**APPELLANT'S REPLY BRIEF**

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**I. APPELLANT'S CHARITABLE ACTIVITIES**

The Respondent in this action apparently asserts that the term "charitable" as used in Section 501(c) (3) of the Internal Revenue Code has the same meaning as providing free services. The Appellant rejects this argument and contends once again that a hospital which provides accommodations and services for the sick and injured on a nonprofit basis is operated exclusively for charitable purposes within the meaning of Section 501(c) (3).

The extent of free services rendered must be entirely dependant on a source of income separate and apart from the services performed in the hospital.

Thus, County operated hospitals often render a considerable amount of free service because appropriations are made to them from General County tax revenues. Also, teaching hospitals may provide free service through clinics, etc., which are financed by endowments and government and private grants. Otherwise, the great majority of private tax-exempt hospitals must depend on charges made to their patients to meet their operating expenses.

It is an uncontroverted fact that Appellant had no endowment and no source of income other than the fees received for services rendered to its patients. For this reason it is apparent that Appellant would be in no financial position to provide free services in any large degree. If it did, either the operating expenses would not be met, or the paying patients would be required to pay excessive charges to cover the free services rendered.

This obvious conclusion is provided for in Rev. Ruling 185, 1956-1 Cum. Bul. 203 shown as Appendix C in Appellant's Opening Brief.

The Supreme Court of Nebraska in a recent decision referred to this same principle when it stated:

“... the courts have defined ‘charity’ to be something more than mere alms-giving or the relief of poverty and distress, and have given it a significance broad enough to include practical enterprises for the good of humanity operated at a moderate cost to those who receive the benefits . . . . Hospitals operated as nonprofit institutions are universally classed as charitable institutions.” *Evangelical Lutheran Good Samaritan*



*Society v. County* (1967) 151 N.W. 2d 446 (Nebraska).

The California State Revenue and Taxation Code Section 214 referring to the welfare exemption granted various organizations in the State of California specifically includes the word "hospital" along with "religious, scientific or charitable" in the qualifying organizations. (See Appendix A.)

It is true that the amount of free services provided was small in comparison to the gross business done, however, since no outside financial resources were available, one would hardly expect a larger portion of free services. Appellant did provide a reasonable amount of free or reduced charge services, and in an area most needed in the community. If a patient had limited insurance benefits or was otherwise ineligible for County Hospital care, and still unable to pay for medical treatments, then the Appellant accepted the patient on the basis of receiving partial payment. (Findings of Fact, p. 12; Tr. pp. 58-68 and 115-118.)

Thus within its limited ability Appellant did, in fact, furnish free or part pay services to those who needed it most.

It is difficult to imagine a more reasonable method of providing for such charitable community needs within the ability of Appellant and it is strongly urged that this argument of the Respondent be rejected.

## **II. PHYSICIANS' BENEFITS THROUGH PATIENTS BEING ADMITTED TO THE HOSPITAL.**

The Respondent also contends that the founding doctors were benefited by having their patients treated in Appellant's facilities. Every hospital provides facilities in which physicians perform their services. This includes the surgeries, the delivery rooms, the patient wards, etc. This must be indeed a novel argument, because it is doubtful that any hospital in the world doesn't provide some indirect benefit to the physicians who practice there. Even interns and residents receive a certain amount of training in their profession and in every instance a hospital does provide its staff physicians with a place in which to treat their patients.

Appellant, again, strongly urges that this contention be rejected.

---

## **III. PAYMENTS TO THE FOUNDING PHYSICIANS BY THE SONORA LABORATORY AND X-RAY COMPANY.**

It is submitted that the main and only substantial question in this action regards the cash payments made to the founding physicians by the Sonora Laboratory and X-ray.

It was Appellant's contention at the trial of this matter that even if the payments had been made to the founding physicians directly from hospital income, such payments were justified as proper compensation for services rendered. It is recognized that the Tax Court made a contrary finding. We contend that such a contrary finding is not substantiated by the evidence



presented at the trial and still persist in our belief that Dr. Boice and Dr. Anspach did perform services that would justify the compensation paid them, even if it had been paid directly from hospital income.

However, we do not believe that such a finding is necessary to sustain Appellant's contention.

Both by stipulation and finding of fact it is absolutely determined that the Rucker Brothers operated the Sonora Hospital Laboratory and X-ray Company as a completely separate business entity in partnership form. Therefore, all fees received by the Laboratory and X-ray Company belonged to and became the income of the Laboratory and X-ray Company and such fees were never at any time the income of Appellant.

Good reason existed for this arrangement between Appellant and the Laboratory and X-ray. In fact, no one has questioned the propriety of the Laboratory and X-ray operating a separate business entity and receiving the income from which it paid Dr. Boice and Dr. Anspach.

It is also uncontroverted that the money received by Dr. Boice and Dr. Anspach was paid from the income of the Sonora Hospital Laboratory and X-ray Company and not from the income of Appellant. Sonora Hospital Laboratory and X-ray was a profit-making taxpaying entity and as such could do with their income what they pleased. Their books and records showed the receipt of income as belonging to the Laboratory and X-ray and, of course, their

records showed the payments to Dr. Boice and Dr. Anspach.

The arrangement between the Laboratory and X-ray and Dr. Boice and Dr. Anspach was an arm's length transaction consummated even prior to the establishment of the Appellant's facilities.

The arrangement between the Appellant and the Laboratory and X-ray is not criticized and seems perfectly reasonable under the circumstances.

Thus, the simple, uncontroverted fact remains that the income received by the doctors and for which Appellant has been denied its tax-exempt status is not in any way the income of Appellant. Clearly no part of the net earning of Appellant inured to the benefit of any individual, and Appellant vigorously contends that the uncontroverted facts in no way should jeopardize Appellant's tax-exempt status.

---

#### IV. CONCLUSION

The Respondent again bases its claim for affirmation of the tax court decision by taking all the facts together, Appellant should be denied its tax-exempt status. This Appellant rejects. It appears that not one of the contentions made by the Respondent would deny Appellant its exempt status and it is argued that in the aggregate such contentions cannot be used to deny the exempt status.

For the above reasons and those contained in Appellant's Opening Brief, it is respectfully urged that



the decision of the Tax Court be reversed and that a decision be made holding that for the years in question Appellant was organized within the provision of Internal Revenue Code Section 501(c)(3) and that the revocation of the exempt status be annulled.

Dated, San Jose, California,  
June 17, 1968.

Very respectfully yours,  
ANDERSON AND MORGAN,  
By ALVIN L. ANDERSON,  
*Attorneys for Appellant.*

---

#### CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ALVIN L. ANDERSON,  
*Attorney for Appellant.*

**(Appendix A Follows)**



## **Appendix A**





## Appendix A

---

### CALIFORNIA REVENUE AND TAXATION CODE SECTION 214

Property used exclusively for religious, hospital, scientific, or charitable purposes owned and operated by community chests, funds, foundations or corporations organized and operated for religious, hospital, scientific, or charitable purposes is exempt from taxation if:

(1) The owner is not organized or operated for profit; provided, that in the case of hospitals, such organization shall not be deemed to be organized or operated for profit, if during the immediate preceding fiscal year the excess of operating revenues, exclusive of gifts, endowments and grants-in-aid, over operating expenses shall not have exceeded a sum equivalent to 10 percent of such operating expenses. As used herein, operating expenses shall include depreciation based on cost of replacement and amortization of, and interest on, indebtedness;

(2) No part of the net earnings of the owner inures to the benefit of any private shareholder or individual;

(3) The property is used for the actual operation of the exempt activity;

(4) The property is not used or operated by the owner or by any other person so as to benefit any officer, trustee, director, shareholder, member, employee, contributor, or bondholder of the owner or

operator, or any other person, through the distribution of profits, payment of excessive charges or compensations or the more advantageous pursuit of their business or profession;

(5) The property is not used by the owner or members thereof for fraternal or lodge purposes, or for social club purposes except where such use is clearly incidental to a primary religious, hospital, scientific, or charitable purpose;

(6) The property is irrevocably dedicated to religious, charitable, scientific, or hospital purposes and upon the liquidation, dissolution or abandonment of the owner will not inure to the benefit of any private person except a fund, foundation or corporation organized and operated for religious, hospital, scientific, or charitable purposes;

(7) The property, if used exclusively for scientific purposes, is used by a foundation or institution which, in addition to complying with the foregoing requirements for the exemption of charitable organizations in general, has been chartered by the Congress of the United States (except that this requirement shall not apply when the scientific purposes are medical research), and whose objects are the encouragement or conduct of scientific investigation, research and discovery for the benefit of the community at large.

The exemption provided for herein shall be known as the "welfare exemption." This exemption shall be in addition to any other exemption now provided by law. This section shall not be construed to enlarge the

college exemption. Property used exclusively for school purposes of less than collegiate grade and owned and operated by religious, hospital or charitable funds, foundations or corporations, which property and funds, foundations or corporations meet all of the requirements of this section, shall be deemed to be within the exemption provided for in Section 1c of Article XIII of the Constitution of the State of California and this section.





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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DON McGUIRE,

Appellant,

vs.

GENERAL FOODS,

Appellee.

---

APPELLANT'S BRIEF

---

APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA  
CENTRAL DIVISION

---

SIMON, SHERIDAN, MURPHY,  
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N O. 2 1 6 4 3

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N O. 2 1 6 4 3

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DON McGUIRE,

Appellant,

vs.

GENERAL FOODS,

Appellee.

---

APPELLANT'S BRIEF

---

I

STATEMENT OF PLEADINGS DISCLOSING THE  
BASIS OF JURISDICTION

---

Appellant, on September 14, 1965, filed a complaint in the then United States District Court for the Southern District of California, Central Division (hereinafter the United States District Court, Central District of California), against Columbia Broadcasting System, Inc., Columbia Broadcasting System Films, Inc., and appellee, General Foods, alleging violations of the federal anti-trust laws [CT 2]. <sup>1/</sup> The complaint alleges the defendants

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<sup>1/</sup> CT refers to Clerk's Transcript.



violated the anti-trust laws of the United States and specifically Section 1 of the Sherman Act (15 U.S.C.A. §1); Section 2 of the Sherman Act (15 U.S.C.A. §2); and Section 3 of the Clayton Act (15 U.S.C.A. §14) [CT 2-19].

Jurisdiction of the United States District Court for the Central District of California is based upon 15 U.S.C.A. §§ 4, 15 and 25, and 28 U.S.C.A. §1337.

On November 29, 1965, appellee General Foods filed its answer to the complaint [CT 20].

On December 30, 1965, defendants Columbia Broadcasting System, Inc. and Columbia Broadcasting System Films, Inc. filed a joint answer to the complaint [CT 32].

On March 8, 1966, appellee General Goods moved for summary judgment [CT 74].

On May 27, 1966, appellant Don McGuire filed his opposition to appellee's motion for summary judgment [CT 187].

On May 31, 1966, United States District Judge Jesse W. Curtis conducted a hearing on appellee's motion for summary judgment; and on June 9, 1966, Judge Curtis granted appellee's motion [CT 241].

On July 6, 1966, appellant noticed his appeal to this Court from the order granting summary judgment; appellee moved to dismiss this appeal as not being final and lacking the District Court's certification of finality, and this Court dismissed the appeal on November 2, 1966 [CT 243].

On November 9, 1966, appellant moved in the District Court





to amend the order granting appellee summary judgment by finding and concluding that there was no just reason for delaying this appeal [CT 272]; appellee opposed said motion [CT 279]; and the District Court Judge Jesse W. Curtis on December 20, 1966, amended the order granting appellee summary judgment in which the court specifically found and concluded that there was no just reason to delay this appeal [CT 313]. The amended order granting such judgment was entered and filed on December 20, 1966 [CT 313]. Appellant filed his notice of appeal on December 22, 1966 [CT 319].

This Court has jurisdiction over this appeal under 28 U. S. C. A. §§ 1291, 1292 and 1294(1).

## II

### STATEMENT OF THE CASE

---

This is an appeal from a District Court order granting one of three defendants summary judgment prior to the commencement of any discovery proceedings relative to the successful defendant; therefore, appellant sets forth below a brief review of the pleadings.

#### A. The Verified Complaint <sup>2/</sup>

##### 1. Jurisdiction and Venue

Jurisdiction and venue of this case is in the United States District Court, Central District of California.

---

<sup>2/</sup> Appendix I to this brief diagrams the complaint and the answers.



## 2. Description of the Parties

Appellant, Don McGuire, an independent writer, director and producer of television shows and television series, wrote, directed and produced three television pilots for television series for the 1965-1966 prime time television season entitled A MAN NAMED McGHEE (hereinafter called McGHEE); MEET MAGGIE MULLIGAN (hereinafter called MULLIGAN); and PRESENTING MONA McCLUSKEY (hereinafter called McCLUSKEY).

Defendant Columbia Broadcasting System, Inc. (hereinafter called CBS) operated the nationwide CBS television network, consisting of five wholly owned television stations and some 200 affiliated television stations located throughout the United States. CBS syndicates films to television stations and maintains and operates foreign merchandising and distribution organizations. CBS owns as a wholly owned subsidiary the defendant Columbia Broadcasting System Films, Inc. (hereinafter called CBS Films) and, through this subsidiary, produces television shows and series for network television exhibition during prime time and as such is a competitor of appellant. CBS enters into contracts, arrangements, agreements and understandings whereby television shows and series are produced for exhibition on network television during prime time in which CBS has an ownership, profit participation, or financial investment, and as such is a competitor of appellant.

Defendant CBS Films, a California corporation, is engaged in the business of producing television shows and television series for exhibition on network television during prime time, and as





such is a competitor of plaintiff.

Appellee General Foods (hereinafter called GF), a Delaware corporation, markets throughout the United States and many foreign countries a diversified line of packaged foods and grocery products, such as Jello, Postum, Post Cereals, Maxwell House Coffee, Walter Baker's Chocolate, Calumet Baking Powder, Minute Rice, Swan's Down Flour, Bird's Eye Frozen Foods, Kool-Aid, and Gaines Dog Food. GF is a national television advertiser who spends many millions of dollars a year advertising its products on network television during prime time. GF sponsors television series exhibited on CBS' television network during prime time for which GF agrees to pay and pays CBS for "talent" and "time", that is, for the production of the show and for the air time during which the show is exhibited.

### 3. Description of Co-Conspirators

The 200 non-owned television stations throughout the United States that are affiliated with CBS and its five wholly owned television stations, making up the CBS television network, are named as co-conspirators but not as defendants.

The national television advertisers who have a contractual relationship with CBS, whereby they advertise their products on the CBS television network during prime time are named as co-conspirators but not named as defendants.

### 4. Nature of Trade and Commerce

Television shows exhibited on CBS television network during prime time, the three and one-half hours between 7:30 and 11:00



P. M. each evening, seven days a week, are in interstate and foreign commerce. These shows are almost exclusively filmed shows produced in the Southern District of California and thereafter sent in interstate and foreign commerce to 200 cities in the United States and many cities outside of the United States. Network television is by definition the distribution in interstate and foreign commerce of television signals and communications. Once a television series has been exhibited on CBS' television network during prime time, it is frequently syndicated to television stations throughout the world, and CBS is in the business of syndicating and distributing throughout the world television shows that had once been exhibited on network during prime time. GF advertises its products on CBS' television network during prime time; its commercials are almost exclusively films produced in either New York or California and thereafter sent in interstate and foreign commerce to some 200 cities in the United States and many cities outside of the United States.

## 5. Offenses Charged

Beginning on or about 1960, CBS adopted and started the policy whereby CBS would not exhibit television shows or series over its network during prime time unless it had a financial interest and control of the show or series; each year for the past five years CBS increased its financial interest in and control of the percentage of shows and series so exhibited so that for the 1965-1966 television broadcast year CBS had a financial interest in and control of virtually every television show and series exhibited on CBS'





television network during prime time; and in so doing the defendants and co-conspirators violated the anti-trust laws.

The defendant and co-conspirators have been and are now engaged in an unlawful combination and conspiracy and have been and are now parties to unlawful contracts, agreements and understandings among themselves in unreasonable restraint of interstate and foreign trade and commerce of television shows and series for exhibition over CBS' television network during prime time.

The objective of the unlawful combination and conspiracy was and is that no television show or series will be exhibited on the CBS television network during prime time unless CBS has a financial interest in and control over the television show or series. It was part of the same unlawful combination and conspiracy that any television show or series that was or would be independently produced would be boycotted and not exhibited or sponsored on CBS' television network; and appellee GF, as part of the unlawful combination and conspiracy to boycott any television series to be independently produced, and thus independently owned and controlled.

It was part of said unlawful combination and conspiracy that CBS would and would attempt to obtain exclusive contracts from national television advertisers which would provide that the advertiser would not sponsor television shows or series during prime time on any other nationwide television network.

In 1964, CBS and GF agreed that GF would sponsor television shows and series during prime time exclusively on CBS' television network; that is, appellee GF agreed with CBS that GF



would not buy talent and time for prime time on any other television network; the effect of such dealings was to substantially lessen competition and tend to create a monopoly.

Beginning on or about 1960, CBS has monopolized and has attempted to monopolize and has combined and conspired with CBS Films and appellee GF and with the other co-conspirators to monopolize the interstate and foreign commerce of television shows and series to be exhibited during prime time on the CBS television network.

The unlawful monopoly and attempt to monopolize and the conspiracy to monopolize consists of the continuing efforts, insistence and demand of CBS that it have a financial interest in and control of every television show and series exhibited on its network during prime time or else the show or series will not be exhibited on CBS' television network. CBS affiliates have no control over what will or will not become a television series and they are obligated to accept their prime time television shows from CBS even though CBS has a financial interest in and control over the show.

The above said activity is in violation of the anti-trust laws of the United States and more specifically of Sections 1 and 2 of the Sherman Act as amended (15 U. S. C. A. §§ 1 and 2) and Section 3 of the Clayton Act as amended (15 U. S. C. A. §14).

6. Details of the Offenses Charged

(a) Regarding McGHEE and MULLIGAN

In the summer of 1964, GF committed itself to finance eight television pilots for the 1965-1966 season at a cost of \$816,000.





Benton and Bowles Advertising Agency, on behalf of GF, requested that appellant write, direct and produce two of the eight television pilots, namely: McGHEE and MULLIGAN.

Appellant wrote, directed and produced the television pilots McGHEE and MULLIGAN.

Defendants CBS and CBS Films had no financial interest in or control over eight McGHEE or MULLIGAN.

Appellant delivered the finished pilots of both McGHEE and MULLIGAN television pilots to GF in January of 1965.

GF viewed the eight television pilots it had financed, including McGHEE and MULLIGAN and then notified appellant that McGHEE was the best of the eight and that GF intended to sponsor McGHEE as a television series on prime time on the CBS television network.

GF requested appellant to exhibit the McGHEE and MULLIGAN pilots for CBS, which the appellant did. Appellant advised CBS that GF had already selected McGHEE as the show that it would sponsor on the CBS television network during prime time in the 1965-1966 television season.

CBS notified GF that CBS would not exhibit McGHEE on its television network and that GF should sponsor two other television shows called COUNTRY COUSINS and HOGAN'S HEROES.

The television show COUNTRY COUSINS (since renamed GREEN ACRES) was only a title and an idea and was not a filmed television pilot; the television show HOGAN'S HEROES at this same time was a finished television pilot.



CBS had and has a financial interest in and control over both COUNTRY COUSINS and HOGAN'S HEROES.

GF, along with Benton and Bowles, met with CBS and again advised CBS that GF wished to sponsor McGHEE on the CBS television network during prime time, but CBS refused to exhibit McGHEE and again told GF to sponsor COUNTRY COUSINS and HOGAN'S HEROES.

The McGHEE pilot was viewed by many prospective sponsors of the show as a television series on network television during prime time.

Proctor and Gamble (hereinafter P & G) and Philip Morris Company (hereinafter PM Co. ), national television advertisers, had first call on the Monday, 9:30 P. M. , time slot on the CBS television network.

P & G and PM Co. viewed the McGHEE pilot and notified CBS that they wished to sponsor McGHEE as a television series on the CBS television network during prime time in the Monday, 9:30 P. M. time slot.

CBS again refused to exhibit McGHEE on its network and told P &G and PM Co. that if they wanted the 9:30 P. M. time slot on Monday they would have to sponsor a television series to be called SELENA.

At the time of the notification regarding SELENA to P & G and PM Co. , SELENA was not a television pilot but consisted of a five minute filmed presentation.

CBS had and has a financial interest in and control over





SELENA.

P & G and PM Co. advised CBS they would not sponsor SELENA as a television series on the CBS television network.

In February, 1965, CBS experienced a top management upheaval which resulted in the replacing of top management officials.

P & G and the PM Co. approached the new management of CBS and again requested McGHEE for the Monday night time slot on CBS television network.

CBS again rejected McGHEE and told P & G and the PM Co. that if they wanted the Monday night time slot they would have to sponsor a television series called HAZEL.

CBS had just obtained the rights to the television series HAZEL which had been on another network for a number of years and CBS at this time had a financial interest in and control of the HAZEL series.

P & G and the PM Co. agreed with CBS that they would sponsor HAZEL on the CBS television network on Monday evening at 9:30 P. M. during the 1965-1966 television season.

(b) Regarding McCLUSKEY

Plaintiff wrote, directed and produced the television pilot McCLUSKEY.

In February 1965 the PM Co. viewed McCLUSKEY.

CBS has a contractual relationship with the PM Co. which requires the PM Co. to sponsor television shows and series during prime time exclusively on the CBS television network.



The PM Co. notified appellant and others that they would sponsor the McCLUSKEY television series on the CBS television network during prime time for the 1965-1966 television season.

CBS viewed McCLUSKEY.

CBS notified the PM Co. that they would not exhibit McCLUSKEY on the CBS television network.

CBS advised the PM Co. that if they wanted prime time exposure on the CBS television network they would have to sponsor one of a half dozen other television shows in which CBS had a financial interest and control over.

PM Co. withdrew its offer to sponsor McCLUSKEY as a television series on the CBS television network during prime time.

(c) Regarding Control

CBS Films is producing and controls a substantial percentage of the television shows and series exhibited during prime time on the CBS television network.

Over the past five years, CBS has acquired a financial interest in and control over an ever increasing percentage of the television shows and series exhibited during prime time on its network until it now has a financial interest in and control over virtually every television show and series that will be exhibited on its television network during prime time in the 1965-1966 television season.





7.        Effects of the Monopoly, Attempt to Monopolize, and the Unlawful Combinations, Agreements and Conspiracies.

The following effects have stemmed from the defendants' above described acts: competition among the three television networks for national advertising sponsors has been eliminated; national advertisers have been prevented from sponsoring prime time television shows on other networks; competition among the producers of prime time television shows has been eliminated; competition among the directors of prime time television shows has been eliminated; competition among the writers of prime time television shows has been eliminated; competition among the financial investors and owners of prime time television shows has been eliminated; competition among actors, cameramen, musicians and production crews of prime time television shows has been eliminated; competition among the distributors of television shows for prime time has been eliminated; competition among syndicators of television shows for prime time has been eliminated; competition among foreign syndicators of television shows for prime time has been eliminated; competition among the studios where prime time television shows are made has been eliminated; independent production companies of prime time television shows have been prevented from selling their shows to national advertisers for airing on CBS; independent writers, directors, producers, actors, cameramen, musicians and crews have been prevented from having their work products in prime time television shows being aired on CBS; independent distributors, syndicators and foreign syndicators



of television shows for prime time have been prevented from distributing and syndicating prime time television shows; competition among the advertising agencies representing national advertisers have been prevented from dealing with independently produced and financed prime time television shows; competition among CBS' affiliates for prime time television shows has been eliminated; CBS affiliates have been prevented from deciding what will or will not become a television series during prime time.

The appellant Don McGuire has been damaged as a direct consequence of the defendants' activities as hereinabove described.

8.        Prayer for Relief

Appellant prayed that the defendants' activities be adjudged to be in violation of Section 1 of the Sherman Act, Section 2 of the Sherman Act, and Section 3 of the Clayton Act; that the defendants be perpetually enjoined from such activities; that CBS and CBS Films be perpetually enjoined from producing, financing or owning prime time television shows while CBS is engaged in exhibiting television shows; that CBS be required to advise its affiliates of its financial interest in prime time television shows and to allow its affiliates to exercise independent judgment on programming; that appellant have judgment for his actual damages as ascertained and trebled to an amount equal to at least \$6,000,000; that appellant have his costs and reasonable attorney fees against all defendants; and that appellant have such other and further relief as the court may deem just.

In summary, the complaint alleges that appellee GF and





defendants CBS and CBS Films, along with other co-conspirators not named as defendants, committed the following anti-trust violations:

(a) Combined and conspired in restraint of interstate trade and commerce in prime time television shows and series;

(b) Agreed to boycott and boycotted from sponsorship and exhibition during prime time on network television any television show or series that was independently produced, owned or controlled;

(c) Entered into exclusive dealing contracts between CBS and GF, by which GF agreed not to sponsor television shows or series during prime time on any other national television network than the CBS television network; and

(d) Unlawfully monopolized, attempted to monopolize and conspired to monopolize the interstate and foreign commerce of television shows and series to be exhibited on prime time on the CBS television network.

B. The Answer of Appellee General Foods

After service of the complaint, appellee GF filed its answer in the United States District Court [CT 20] (see Appendix I). GF in its answer admitted the following: that jurisdiction and venue were properly in the United States District Court for the Central District of California; that GF is a Delaware corporation with its principal place of business in New York, and that it does business in the Central District of California; that it markets



packaged foods and grocery products under well-known brand names and is a national television advertiser spending millions of dollars a year on television advertising during prime time; that it sponsors television series on the CBS network and pays CBS for time and talent for said series; that it has contracts with CBS, and that it uses advertising agencies in dealing with CBS; and that it advertises its products on CBS during prime time.

GF in its answer also admitted: that in 1964, it commissioned the production of eight television pilots; that Benton and Bowles, on behalf of GF, arranged for appellant McGuire to participate in the McGHEE and MULLIGAN pilots. However, GF denied, on the basis of not knowing, that the appellant wrote, directed and produced the McGHEE and MULLIGAN pilots and denied knowing if CBS had a financial interest in or control over McGHEE or MULLIGAN.

GF in its answer admits that it viewed the McGHEE and MULLIGAN pilots as well as the other six pilots it had financed and GF also admits that they arranged for CBS to see the McGHEE and MULLIGAN pilots in Los Angeles. GF also admitted that it agreed with CBS to participate in the sponsorship of COUNTRY COUSINS and HOGAN'S HEROES.

C. The Joint Answer of CBS and CBS Films

After service of the complaint, defendants CBS and CBS Films filed a joint answer in the United States District Court [CT 32 ] (See Appendix I). CBS and CBS Films in their answer





admitted the following: that jurisdiction and venue were properly in the United States District Court for the Central District of California; that CBS is a New York corporation with its principal place of business in New York and that it does business in the Central District of California; that CBS operates the CBS television network, consisting of five wholly owned television stations in New York, New York; Los Angeles, California; Chicago, Illinois; Philadelphia, Pennsylvania; and St. Louis, Missouri, and two hundred affiliated television stations throughout the United States; that CBS syndicates television films and operates foreign merchandising and distribution organizations of television shows and has subsidiary companies for such purposes in many foreign lands; that CBS Films is a wholly owned subsidiary of CBS; and that CBS produces, owns, has profit participations and investments in prime time television shows and as such is a competitor of appellant.

CBS Films admitted it is a California corporation with its principal place of business in New York, New York.

In their answer, it was admitted that CBS has contracts with national television advertisers including GF; that national television advertisers use advertising agencies in dealing with CBS, including GF; that television shows on CBS during prime time are in interstate and foreign commerce; that CBS network exhibits during prime time are mostly films made in California and sent in interstate commerce to 200 cities in the United States and elsewhere; that after a television series has been exhibited on the CBS network, said series are frequently syndicated world-wide by



CBS; and that GF advertises its products on CBS television network during prime time.

In the answer, CBS and CBS Films also admit: that they had no financial interest or control over McGHEE, MULLIGAN or McCLUSKEY; that they did have financial interest or certain rights in HOGAN'S HEROES, COUNTRY COUSINS, SELENA and HAZEL; that at the time involved, neither SELENA or COUNTRY COUSINS was a pilot; that GF agreed to broadcast commercials on COUNTRY COUSINS and HOGAN'S HEROES.

D. Discovery Proceedings

On February 21, 1966, appellant filed and served a comprehensive set of interrogatories on defendant CBS [CT 43-73]. On May 23, 1966, defendant CBS filed and served partial answers to these interrogatories. This date is prior to the grant of summary judgment to appellee GF. Since the granting of summary judgment to the appellee, additional answers to the interrogatories have been filed by defendant CBS, however, these additional answers were not before the trial court at the time of the ruling on the motion for summary judgment.

No pretrial discovery of any type, form or description was had by the appellant as to the appellee.

E. Appellee's Motion for Summary Judgment

On March 8, 1966, appellee moved for summary judgment [CT 74-113, 236-242].





Appellee's motion for summary judgment included the following: the motion; a memorandum of points and authorities in support of the motion; four affidavits in support of the motion; proposed findings of fact and conclusions of law in support of the motion; and a proposed summary judgment [CT 74-113, 236-242].

F.      Appellant's Opposition to Motion for Summary Judgment

On May 27, 1966, appellant Don McGuire filed his opposition to appellee's motion for summary judgment [CT 187-235]. The opposition to the motion for summary judgment included the following: three affidavits and a memorandum of points and authorities in opposition to the motion for summary judgment. It is to be noted that the complaint was personally verified by the appellant.

G.      Appellant's Subpoenas on Appellee's Affiants to Testify at the Hearing on the Motion for Summary Judgment; Appellee's Motion to Quash said Subpoenas; Appellant's Opposition to the Motion to Quash; the District Court's Order Quashing said Subpoenas.

Appellee, in support of his motion for summary judgment, filed four affidavits, including the affidavit of Edwin W. Ebel, the Vice-President for Advertising Services of appellee GF, and the affidavit of Lee Rich, Senior Vice-President of Benton and Bowles, Inc., in charge of Media, Radio and Television Departments.

On May 4, 1966, appellant caused a subpoena to be served upon Mr. Ebel in Los Angeles, California, and on May 6, 1966, appellant caused a subpoena to be served on Mr. Rich in Los



Angeles, California; both subpoenas called for their appearance and testimony at the time of the hearing on the motion for summary judgment. Neither subpoena called for them to produce any records of any kind.

On May 13, 1966, appellee moved to quash the Ebel subpoena and for an order that no testimony be taken in connection with the hearing on the motion for summary judgment [CT 130]. A memorandum of points and authorities in support of said motion was also filed [CT 114-128].

On May 19, 1966, appellant filed his opposition to the motion to quash the Ebel subpoena and to the motion that no testimony be taken at the hearing on the motion for summary judgment [CT 133]. On May 23, 1966, in the United States District Court, a hearing was held on the motion to quash the subpoena and to prohibit any testimony on the hearing on the motion for summary judgment, and the District Court granted both motions [CT 135].

#### H. Hearing and Ruling on Motion for Summary Judgment

On May 31, 1966, in the United States District Court, a hearing was held on appellee's motion for summary judgment. This hearing consisted solely of the files and records in the case to date and the arguments of counsel. No witnesses testified.

On June 9, 1966, the District Court filed and entered summary judgment for appellee GF [CT 241]. The District Court signed the proposed findings of fact and conclusions of law that had been proposed by appellee GF without a single change.





I. Prior Unsuccessful Appeal: No. 21250 in this Court

On July 6, 1966, appellant filed his notice of appeal from the grant of summary judgment to appellee GF [CT 243]. Designations of the record on appeal were filed [CT 244-248].

Appellee moved in this Court to dismiss the appeal on the basis that the summary judgment granted appellee was a non-appealable order as there was no finding in the District Court that there was "no just reason for delay". Appellant opposed said motion. On November 3, 1966, Circuit Judges Chambers, Barnes and Ely ordered the appeal dismissed. This appeal was numbered 21250.

J. The Current Appeal

On November 9, 1966, appellant moved in the District Court to amend the summary judgment given in favor of appellee GF to include a certificate of appealability [CT 272]. On November 16, 1966, appellee filed its opposition to appellant's motion to amend the summary judgment [CT 284]. A hearing was held in the United States District Court on appellant's motion to amend the summary judgment, and on December 20, 1966, the District Court filed and entered its order amending the summary judgment given to appellee GF by including a certificate of appealability [CT 313].

On December 22, 1966, appellant filed his notice of appeal [CT 319]. The purpose of this appeal is to raise the validity of the District Court in granting summary judgment to the appellee; in making certain specified findings of fact; in drawing certain



specified conclusions of law; in quashing the subpoena on Mr. Ebel; and in granting appellee's motion that no testimony be taken at the hearing for summary judgment.

### III

#### SPECIFICATION OF ERRORS

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A. Appellant's Statement of Points to be Relied on Upon Appeal

In March of 1967, appellant filed in this Court his statement of points to be relied on in this appeal pursuant to Rule 17(6) of this Court.

B. Specification of Errors Relied Upon in this Appeal

Appellant relies upon the following specification of errors in this appeal:

(1) The District Court erred in granting summary judgment to appellee GF.

(2) The District Court erred in quashing the subpoena on Mr. Ebel calling for his appearance and testimony at the hearing on the motion for summary judgment.

(3) The District Court erred in granting appellee's motion that no testimony be taken at the hearing on appellee's motion for summary judgment and by so doing quashing the subpoena on Mr. Rich, who had not moved to have the subpoena quashed.





(4) The District Court erred in findings of fact Nos. 5, 7, 9, 11 and 12.

(5) The District Court erred in conclusions of law Nos. 1, 2, 3, 4 and 5.

#### IV

#### SUMMARY OF ARGUMENT

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A. The trial court erred in granting appellee summary judgment.

1. Summary judgment in the trial court is not to be granted if there are genuine issues of material fact; it is not a substitute for the trial of disputed issues of fact; the moving party has the burden of proof; and it is rarely proper in complicated cases prior to discovery.

2. The test on reviewing a grant of summary judgment is to resolve all factual disputes and draw all inferences in favor of the party opposing summary judgment.

3. Summary judgment in anti-trust litigation should be used sparingly.

4. There were numerous disputed issues of material facts pointed out to the trial court which makes summary judgment inappropriate and erroneous.

5. The television industry has been studied



and investigated by numerous governmental bodies and their findings were put before the trial court, and they justify a denial of summary judgment.

6. Since the grant of summary judgment, there have been additional governmental reports which justify the reversal of the grant of summary judgment.

7. There is a genuine issue of fact as to whether GF agreed to boycott independently owned, controlled and produced shows and series during prime time.

8. There is a genuine issue of fact as to whether GF has an exclusive dealing arrangement with CBS relative to the sponsorship of television shows and series exhibited during prime time on network television.

9. There is a genuine issue of fact as to whether there is a forbidden tying arrangement between CBS and GF.

10. There is a genuine issue of fact as to whether GF has conspired, combined and agreed with CBS and other co-conspirators in restraint of trade.

11. There is a genuine issue of fact as to whether GF conspired with CBS and other co-conspirators to monopolize or attempt to monopolize television shows and series exhibited during prime time over the CBS television network.

B. The District Court erred in quashing the subpoena on Mr. Ebel, calling for his appearance and testimony at the





hearing on the motion for summary judgment.

C. The District Court erred in granting appellee's motion that no testimony be taken at the hearing on the motion for summary judgment, and by so doing quashing the subpoena on Mr. Rich.

D. Finding of Fact No. 5 is clearly erroneous.

E. Finding of Fact No. 7 is clearly erroneous.

F. Finding of Fact No. 9 is clearly erroneous.

G. Finding of Fact No. 11 is clearly erroneous.

H. Finding of Fact No. 12 is clearly erroneous.

I. Conclusion of Law No. 1 is clearly erroneous.

J. Conclusions of Law Nos. 2, 3 and 4 are clearly erroneous.

K. Conclusion of Law No. 5 is clearly erroneous.

V

ARGUMENT

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A. THE TRIAL COURT ERRED IN GRANTING APPELLEE SUMMARY JUDGMENT.

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1. Summary Judgment in the District Court.

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Rule 56 of the Federal Rules of Civil Procedure governs the scope, function and applicability of summary judgment.

Rule 56(c) provides in pertinent part:



" . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ."

Summary judgment is not a substitute for the trial of disputed issues of fact.

In Griffeth v. Utah Power & Light Co., 226 F.2d 661 (9th Cir. 1955), this Court said:

"The trial court was vested with no discretion.

The federal constitution gives a right of jury trial in a contested issue in a law action. This right is positive and should not be whittled away by decision of contested issues by the judge at hearings in camera before trial. The summary judgment rule does not confer this power even in a non-jury case.

The remedy can be invoked only when complete absence of genuine fact issue appears on the fact of the record. Resort to summary judgment procedure is futile where there is any doubt as to whether there is a fact issue. All doubts upon the point must be resolved against the moving party.

This Rule, on account of these limitations, was not





intended to be used as a substitute for a regular trial of cases where 'there are disputed issues of fact upon which the outcome of the litigation depends.' This procedure is not, and of right ought not to be, a substitute for a trial by jury or judge. Plaintiffs had set up a claim of the negligence of defendant in respect to the release of water through their land. The defendant controverted the negligence. Even if the trial court believed there was no chance of recovery, he was bound to try out the issue thus contested. This is true even though the court may have believed some one issue was decisive."

The purpose of a hearing on a motion for summary judgment is to determine if there are any factual issues to be tried; and if there are disputed issues of fact, the motion must be denied.

Byrnes v. Mutual Life Ins. Co. of N. Y. ,

217 F.2d 497 (9th Cir. 1955), cert. denied,

75 S. Ct. 532, 348 U.S. 971.

When the litigation involves complicated issues of fact which must first be resolved in order to adequately deal with difficult questions of law, summary judgment should be denied.

Miller v. General Outdoor Advertising Co. ,

337 F.2d 944 (2nd Cir. 1964);

S. J. Graves & Sons Co. v. Ohio Turnpike Commis-

sion, 315 F.2d 235 (6th Cir. 1963),



cert. denied 84 S. Ct. 65, 375 U.S. 824;

Clarke v. Montgomery Ward & Co.,

298 F.2d 346 (4th Cir. 1962).

The party that moves for summary judgment has the burden of demonstrating that there is no genuine issue of fact, and any doubt about the existence of such an issue must be resolved against the moving party.

Byrnes v. Mutual Life Ins. Co. of N.Y., supra;

Cox v. Amer. Fidelity & Cas. Co.,

249 F.2d 616 (9th Cir. 1957).

Where the pleadings set forth issues which are not attacked by affidavits in support of a motion for summary judgment, then the motion in that regard should be denied. This is particularly applicable when the complaint is verified, as in this case.

Albert Dickinson Co. v. Mellos Peanut Co. of Ill.,

179 F.2d 265 (7th Cir. 1950).

In Poller v. CBS, Inc., et al., 82 S. Ct. 486, 368 U.S.

464 (1962), Justice Clark, writing for the majority and reversing the trial court's grant of the defendant's motion for summary judgment, said:

"Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc.





This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944). "

. . .

"It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on the record that 'it is quite clear what the truth is.' Certainly there is no conclusive theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark



of 'even handed justice'."

Justice Harlan, writing a dissenting opinion in the same case, pointed out:

"In this case petitioner, the party opposing the motion, had complete access by means of pretrial discovery to all the evidence he could marshal at a trial on the merits. Neither his cross-examination of hostile witnesses nor his own direct testimony by way of deposition and affidavit produced any evidence which would indicate that the respondents sought to accomplish anything more than to purchase for CBS an UHF station in Milwaukee."

. . .

"Despite the ample opportunity afforded him by the availability of pretrial discovery procedures, petitioner, as will be shown, was able to produce no evidence to support his charges that a conspiracy, narrow or far-reaching, had been hatched. He should not be permitted to proceed to trial just on the hope that in the more formal atmosphere of the courtroom witnesses will revise their testimony or that a clever trial tactic will produce helpful evidence."

In the civil anti-trust case of United States v. Diebold, Inc., 82 S. Ct. 993, 369 U.S. 654 (1962), the Supreme Court in a per





curiam opinion reversed the trial court's grant of summary judgment, and said:

"On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of International Shoe Co. v. Federal Trade Comm'n., it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment."

2.        The Test on Reviewing a Grant of  
             Summary Judgment

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An appellate court, when reviewing a grant of summary judgment, must resolve factual disputes in the manner most favorable to the party opposing the motion for summary judgment, and all inferences to be drawn from the underlying facts must be viewed in the light most favorable to appellant.

Frey v. Frankel, 361 F.2d 437 (10th Cir. 1966);

Swain v. Isthmian Lines, Inc.,

360 F.2d 81 (6th Cir., 1966);



Parlane Sportswear Co. v. United States,

359 F.2d 974 (1st Cir. 1966);

Jobson v. Henne, 355 F.2d 129 (2nd Cir. 1966);

Guidry v. Continental Oil Co., 350 F.2d 342

(5th Cir. 1965);

United States v. Bob Crislaw, Inc., 341 F.2d 887

(7th Cir. 1965);

Mahler v. United States, 306 F.2d 713

(3rd Cir. 1962), cert. denied 83 S. Ct. 290,

371 U.S. 923;

Libby v. L. J. Corp., 247 F.2d 78

(D. C. Cir. 1957);

Carr v. City of Anchorage, 243 F.2d 482

(9th Cir. 1957).

### 3. Summary Judgment in Anti-trust Litigation

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"We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."

Justice Clark so wrote in Poller v. CBS, supra.

In White Motor Co. v. United States, 83 S. Ct. 696, 372

U.S. 253 (1963), a civil anti-trust suit, the Supreme Court, in





reversing a grant of summary judgment, said:

"Summary judgments have a place in the antitrust field, as elsewhere, though as we warned in Poller v. Columbia Broadcasting System [citation omitted], they are not appropriate 'where motive and intent play leading roles'."

See also:

Crest Auto Supplies, Inc. v. Ero Manufacturing Co.,

360 F.2d 896 (7th Cir. 1966);

South Carolina Council of Milk Producers, Inc. v.

Newton, 360 F.2d 414 (4th Cir. 1966);

Tillamook Cheese & Dairy Assn. v. Tillamook

County Creamery Assn., 358 F.2d 115

(9th Cir. 1966).

4. Disputed Issues of Material Facts  
as Pointed Out to the District Court.

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In the District Court, appellant in his opposition to the motion for summary judgment [CT 187-236] pointed out the following fact issues that were put into dispute by the pleadings and the affidavits:

1. Is defendant General Foods exclusive to defendant in the sponsorship of television series exhibited during prime time?

2. Did defendant General Foods have an option on the



McGHEE show?

3. Did defendant General Goods pick up the option on the McGHEE show?

4. Did defendant CBS refuse to allow defendant General Foods to sponsor McGHEE on defendant CBS' during prime time?

5. Did defendant CBS tie the sale of network time to the purchase of CBS-owned and controlled shows?

6. Did defendant General Foods agree with defendant CBS to boycott independently produced television shows for network exhibition during prime time?

7. Did defendant General Foods agree with defendant CBS to restrain trade?

8. Is it defendant CBS' policy to exhibit only those television series in which it has financial interests and control?

9. Did defendant General Goods agree with defendant CBS to attempt to monopolize the exhibition of television series shown during prime time?

10. What was defendant General Foods' state of mind in its dealings with defendant CBS?

5. Background of the Television Industry as Pointed Out to the District Court.

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In the District Court, appellant in his opposition to the motion for summary judgment [CT 187-236] pointed out that numerous governmental committees and agencies had spent years delving





into the complexities of network television, and appellee GF, as one of the world's largest national television advertisers, participated in many of these investigations. In fact, Edwin Ebel, whose affidavit was filed in support of the motion for summary judgment, testified before one of these investigating bodies and portions of his testimony were set out in appellant's opposition [CT 187-236].

On March 13, 1957, the Antitrust Subcommittee of the Committee of the Judiciary, House of Representatives, filed their report on The Television Broadcasting Industry. Honorable Emanuel Celler is the Chairman of both the Committee on the Judiciary and the Antitrust Subcommittee, and this report came after extensive hearings. Following are some excerpts from this report:

Regarding network programing:

"Production of a television network program may be undertaken by an independent producer, by the network itself, or by a producer in some way affiliated with the network organization.

"The wholly independent producer assembles the program 'package' without financing, affiliation, or profit participation on the part of the network and attempts to license its show for network broadcast either to an advertiser or to the network itself.

"When the network performs the producer function, it puts the entire show together, assembling all essential elements, such as technical staff, writers, talent and facilities.



"When the network is not the producer, however, it frequently has an initial financial interest in the program, in the producer, or in both. Such network-program interest or network-producer interest takes a variety of forms. The producer may put the show together for the network for a fixed price or for a percentage of the profits to be derived by the network from broadcast; the producer may be a separate corporation in which the network owns a substantial stock interest, or the network may bring its own program package into the studio of a producer and pay him a fixed fee under a facilities contract for stage space and technical services." (pages 40-41).

The report then points out that CBS in the fall of 1956:

(1) owned 29.6% of all programs which was 18.8% of prime evening hours programs; (2) had financial interest in an additional 28% of all programs which was 31.7% of prime evening hours programs; and (3) that these two total that CBS had a financial interest in 57.6% of all programs which was 50.5% of prime evening hours programs.

"Independent producers often encounter difficulties in getting their shows on a network. They advance two principal reasons for this. They contend that when they attempt to sell a program directly to a network they are met by demands for so large a





profit participation that the transaction becomes financially infeasible. They also contend that networks tend to give preference to programs in which they have a financial interest.

"The exploitation of a network program offers three potential opportunities for profit. First, of course, the amount received from the sponsor may exceed the cost of production. Second, the sponsor usually pays for the right to broadcast the program on television for the first time, leaving the owner free in case of filmed programs (including live programs that have been filmed) to sell to other interested parties the right to rerun all or part of the program on television after the first run. Third, profits also inhere in subsidiary or merchandising rights in some programs. These rights involve exploitation of the popularity of the program by licensing the use of its name, or the name or likeness of its star and/or other members of the cast, to manufacturers and distributors of commercial products.

"In selling programs to network, independent producers prefer to license the first-run exhibition rights and retain the rerun and subsidiary rights. Under such an arrangement, the network's potential profit from the program would lie in its time charges and in the excess, if any, over cost for which the



network sold the program to a sponsor, leaving the producer free to sell rerun and merchandising rights to others." (page 43)

. . .

"Because the networks retain the right to determine what programs they will televise, sales of network programs by independent producers to advertisers are made subject to network approval. Several independent producers have taken the position that when a network and an independent producer both wish to sell the advertiser a program for the same time period, there is a tendency on the part of the network to disapprove the independent's production on some such ground as the requirements of 'good programing' or 'the public interest'." (page 50)

For an amazing coincidence to the allegations in the complaint, note the following fact situation as reported by the sub-committee:

"One of a number of alleged instances of this tendency brought to the committee's attention by independent producers involved a program called You Can't Take It With You, produced by Screen Gems, Inc., and based on the Kaufman and Hart Pulitzer prize-winning play and Academy Award winning motion picture of the same name. Mr. Ralph M. Cohn,





vice president and general manager of Screen Gems, testified that in the late spring of 1955 his company completed the initial program of a proposed series and interested Carter Products and its advertising agency, Sullivan, Stauffer, Colwell & Bayles in the series. Carter Products had been sponsoring a program on CBS called Meet Millie. According to Mr. Cohn, the sponsor had been quite satisfied with the show but had been notified by CBS that it would have to be discontinued. Carter, free to bring in any other program for consideration by CBS, submitted You Can't Take It With You. CBS informed the advertiser that this program was not acceptable.

"Thereafter, Mr. Donald D. Stauffer, of the advertising agency, submitted scripts of future episodes in the series to CBS in an effort to induce CBS to change its mind. Executives of Screen Gems met with executives of CBS for the same purpose.

"CBS planned to fill the Carter Products time period with a CBS-owned program entitled 'Joe and Mabel.' Having refused to allow Carter Products to continue Meet Millie and having rejected You Can't Take It With You, CBS offered Carter Products Joe and Mabel, which the advertiser accepted.

"Mr. Cohn further testified that shortly



before air date, CBS executives finally saw the first few episodes of Joe and Mabel, the program they had chosen, and realized for the first time that 'it was unfit for human consumption.' As a consequence, Meet Millie, which it may be observed is also a CBS-owned show, was brought back on the air." (page 51)

Change the name of the program from "You Can't Take It With You" to "A Man Named McGhee" and it would be a rerun of the complaint herein. It also indicates a conscious, intentional course of conduct and anyone spending millions of dollars on television advertising a year cannot be blind to these facts.

The report cites another such incident:

"A second instance in which an independently produced program was rejected in favor of a show in which a network was financially interested involved Four-Star Playhouse, a film series of half-hour dramas featuring Dick Powell, David Niven, Charles Boyer, and Ida Lupino, and sponsored alternately by Singer Sewing Machine Co. and Bristol-Myers. The program won a number of awards; its audience ratings were good, and the sponsors were most happy with it.

"In February 1956, when Four-Star Playhouse had been on CBS for 4 years, Young & Rubicam, the





advertising agency, notified the network that the sponsors wanted to renew the show for another year. CBS replied that Four-Star Playhouse was no longer acceptable because the network was planning to program a series of dramatic shows to be called Playhouse 90 that would last an hour and a half and would absorb the half-hour slot that was occupied by Four-Star Playhouse. Despite the advertisers' dissatisfaction, CBS offered them the alternative of joining in sponsorship of Playhouse 90, or losing their time period. Faced with this choice, the advertisers accepted sponsorship of the new program.

"It may be noted the live portions of Playhouse 90 are produced by CBS, which also shares in all profits from the film portion which is produced by Screen Gems, Inc.

"Dr. Stanton testified that Four-Star Playhouse was removed from the network solely because the network wanted to strengthen its show. Notwithstanding Dr. Stanton's explanation for the CBS rejection of You Can't Take It With You and its removal of Four-Star Playhouse, the fact remains that both shows had been independently produced and that both were put aside in favor of network-owned properties over the objection of advertising sponsors." (pages 51-52)



As proof of the consciousness of this activity, the report cites an interesting meeting as follows:

"The minutes of a special program planning meeting of the Columbia television division, held on February 25, 1956, seem significant in this context. These minutes indicate that the purpose of the meeting was to select new programs for the fall 1956 schedule and that 27 proposed programs were presented for consideration. Fifteen of these were CBS programs; 12 were programs of outside producers. The minutes further show that not one of the 12 programs in preparation by outside producers was selected by the meeting for CBS programing, whereas several of the programs in preparation by CBS were proposed for placement in the schedule." (page 52)

From these events, the sub-committee drew the following conclusions:

"The question before the committee, not completely resolved by the record, is whether the television networks tie sale of network and network-owned station time to the sale of network owned or controlled programs. The disparate bargaining power enjoyed by the networks by virtue of their control of network time, places them in a position where they can demand and obtain substantial financial





concessions from independent producers. These concessions consist not only of participation in any profits from initial broadcast. They often include a share in rerun and subsidiary rights. They sometimes include stock interest in the producing entity itself.

"Practices such as these, which indicate use of control of network time as a lever for obtaining a financial interest in programing, can have dangerous anticompetitive consequences. They tend to deny independently produced programs access to the national networks unless the network is given financial interest. They tend to afford programs in which the networks have a financial interest an artificial advantage over competing programs. They tend to deprive advertisers of access to independently produced programs and thus limit them in the exercise of program selection.

"Existence of such practices would take on some of the characteristics of conditions condemned by the Supreme Court in the Paramount Pictures case. There, major motion-picture-producing organizations through strategic theater control obtained immeasurable competitive advantage over rival film producers. Such conditions led the Court to require divorcement of the defendants' production operations from their theater operations." (page 54)



These very practices constitute the violations of the anti-trust laws alleged in the instant complaint. In fact, in the 10 years that have elapsed since this report the practices have intensified and expanded.

Network time sales and discounts.

"The gross time charged billed the network advertiser is the aggregate of the network time rate of each of the stations used by the advertiser, less certain quantity discounts which are borne by the network and not by the affiliated station. This station network time rate is fixed by the network and is set forth in the affiliation contract. Under that contract, the network may change the rate at any time, with the right reserved the station to cancel the affiliation if its rate is decreased." (page 61)

. . .

"Each network allows advertisers a variety of quantity discounts. Thus, CBS allows, among other things, a station-hour discount, an annual discount, and an overall discount, up to a maximum of 25 percent of total gross billings. A station-hour discount, ranging from 2-1/2 percent to 15 percent based on the number of station hours actually used, is granted an advertiser using network broadcasts for 26 or more consecutive weeks.

"In addition, an advertiser using the CBS





network for 52 consecutive weeks is entitled to a discount of 10 percent of total gross time charges, while an advertiser using the network consecutively for 26 alternate weeks is entitled to a discount of 5 percent of total gross time charges.

"In lieu of a station-hour and annual discount, CBS allows an advertiser buying a minimum of \$100,000 of station time for 52 consecutive weeks an overall discount of 25 percent on his total time charges." (page 62)

. . .

"As to how the discount system of a particular network operates in actual practice, the following testimony of Dr. Frank Stanton, president of CBS, is pertinent:

COUNSEL. Now, on the basis of the CBS discount system, it is correct, is it not, that an advertiser who, for example, uses a weekly minimum of \$100,000 gross billing for station time during 52 consecutive weeks of an established overall discount year receives a 25 percent overall discount?

MR. STANTON. In lieu of the other discounts.

COUNSEL. He does?

MR. STANTON. Yes. sir.



COUNSEL. This overall annual discount would in effect be applicable to each of the several programs sponsored by the advertiser, whether the program appeared in class C time, class B time, or class A time; is that correct?

MR. STANTON. That is correct.

COUNSEL. To illustrate, Dr. Stanton, how the discount system works, let us take the Proctor & Gamble account in 1955. It is not correct that since that advertiser had over one-half million dollars in average weekly billings and can qualify for the 25 percent overall discount, it follows that Proctor & Gamble received this 25 percent deduction for all its programs including, for example, Guiding Light, which runs for 15 minutes during the day in class C time, and for Topper, which ran for 30 minutes in the evening in class A time; is that right?

MR. STANTON. That is correct.

COUNSEL. Therefore, on an overall basis, a large advertiser like Proctor & Gamble would receive discount deductions of about \$135,000 a week, 25 percent of \$544,300; is that right?

MR. STANTON. I do not quarrel with





your computations.

COUNSEL. They are taken from your computations.

MR. STANTON. Right. I did not think we gave you the dollar discounts.

COUNSEL. We worked out the amount of the discount ourselves. Would it be correct to say that there are at least a dozen such large corporations that received a 25-percent discount on their weekly gross billing in 1955, such as Kellogg, Pillsbury Mills, Westinghouse, Liggett & Myers, Lever Bros., General Mills, Bristol-Myers, R.J. Reynolds, American Home Products, Colgate-Palmolive, Toni, and General Foods?

MR. STANTON. I would have to examine the list, but if you have done so I accept your word. At the present time I think there are six advertisers on the overall discount basis."

(page 64)

These discounts suggest a practical economic reason why a national television advertiser such as defendant General Foods would be exclusive in the sponsorship of television shows with one network.

During the hearings prior to this report, Frank Stanton,



President of CBS, stated:

"We have found, by and large, that the greatest assurance of . . . quality programing is for us to do it ourselves." (page 900, Hearings Before the Anti-Trust Subcommittee)

Mr. Donald Turner, now the Assistant Attorney General in charge of the Anti-Trust Division of the U. S. Department of Justice, along with others, filed a legal memorandum on behalf of Los Angeles California television station KTTV in 1956. In this memorandum he observed:

"Thus, the independent program producer finds himself in the following dilemma:

"(a) He must distribute his program on a national scale during prime viewing time in order to recover the costs of production and a reasonable profit.

"(b) Because of the time-option provisions of network affiliation agreements, the must-buy policy, and the economic power of the network companies over the affiliated stations, prime viewing time on a national scale can today be cleared effectively only through the networks.

"(c) The independent program producer, or the national advertiser who wants to sponsor his program, must, therefore, deal with the network company in order to obtain national distribution





during prime viewing time.

"(d) The network company, however, is producing its own programs and trying to sell its own programs to the same sponsor.

"(e) As a result, the independent program producer can only sell through his own major competitor - the network company - and scales can be made only when the network is unable to persuade the advertising sponsor to take a network-controlled show instead." (page 5542)

"The Supreme Court opinions in the movie cases are almost exact legal and factual precedents for determining whether the conduct of the networks and their affiliated stations amounts to illegal restraints of trade and attempts to monopolize the television industry. As shown below, these opinions clearly establish that the existing time option provisions of the network affiliation agreements and the must-buy policy of NBC and CBS are illegal restraints of trade under section 1 of the Sherman Act, and that the use of these restrictive arrangements constitutes an illegal attempt to monopolize under section 2." (page 5546)

In 1955 a study of network broadcasting was initiated and a Network Study Staff engaged in a two year study of the subject,



financed by Congress. On January 27, 1958, Honorable Oren Harris, Chairman, House Committee on Interstate and Foreign Commerce had this report submitted and printed. Dean Roscoe L. Barrow of the University of Cincinnati Law School headed the network study staff, and this report, of some 737 pages, is referred to as the Barrow Report. There are a number of cogent comments, studies, conclusions, and recommendations in this report which have a direct bearing on the instant case.

On May 8, 1963, Oren Harris, Chairman, Committee on Interstate and Foreign Commerce, filed the Committee's report entitled "Television Network Program Procurement". This is actually the report of the Federal Communications Commission's Office of Network Study. Mr. Edwin W. Ebel testified at the hearings and his testimony is summarized in the report as follows:

"(iii) Edwin W. Ebel, advertising vice president of General Foods Corp., the third largest advertiser in television, observed that 'there very definitely is' a trend toward 'networks' owning shows or acquiring licensing rights to shows.' Up to the time of his testimony, this tendency had not affected his company's ability to get the kinds of shows they desired, but Ebel was 'a little apprehensive' for the future because 'as the networks acquire more and more control' in the sense of contracting with producers, he 'could see difficulty.' But he 'not too alarmed about it,' as the effect will depend 'upon the attitude the networks take





in owning their shows. ' Ebel agreed that network shows were turning in the 'direction of' conformity, stereotypes, etc. But this is true 'not only of television, but of other things. ' One of the problems has been 'a rush of others' to follow 'one kind of thing that becomes successful. ' He believes that network schedules will turn in the direction of diversity and balance and that, at the time he testified, there was 'a great opportunity' for more 'meaningful drama' in network schedules. " (page 82)

On July 2, 1965, Part II of the report from The Office of Network Study of the Federal Communications Commission was released. In the introduction and Summary to this 864 page report, it is stated:

"The record of our inquiry discloses an almost complete concentration of economic and cultural control - a virtual 'monopoly' or 'triopoly,' if you will, of production and procurement of television programs - presently in the hands of the managers of the three national networks. This has come about over the past six or seven television seasons through the progressive operation of program procurement practices through which network managers either produce the programs themselves or, in the more usual case, finance program production by others. In the latter case, network managers almost invariably acquire exclusive rights



to first-run network managers almost invariably acquire exclusive rights to first-run network exhibition directly from the 'independent' producer - frequently a Hollywood film company - 'slot' the program or film series (more usually the latter) into choice evening time and sell advertising participation to several sponsors. Often network managers 'buy' the series and place it in the schedule before sponsorship has been obtained and assume the economic 'risk' of sale of advertising positions in the program. Many of the programs procured in this fashion are hour-long film series designed to produce bulk circulation. Advertising is sold on the basis of 'minutes' to several sponsors on the same program hour.

"In addition to proprietary control of such programs through the first-run license, network managers - usually as a quid pro quo for initially financing the 'pilot' but sometimes merely as 'compensation' for assumption of the 'risk' of 'sale' to advertisers - in 'bargaining' with the producers, insist upon and frequently obtain separately or in combination the right to share in profits from subsequent runs; the right to distribute the programs or series in domestic syndication and in foreign markets; the right to share (usually 50 percent for a term of years or in perpetuity) in the profits from domestic and foreign syndication sales; exploitation rights and





shares of profits in merchandizing; and the right to share in other nonbroadcast interests (e. g. motion pictures, books, magazines, phonograph records, and plays). Also, these 'bargains' usually accord - either by contract or acquiescence - network managers the 'right' to participate in the creative process (subject matter, writing, casting, etc.) to the extent necessary to assure themselves and mass advertisers that the program or series will be initially designed to attract large circulation and that subsequent episodes of a series will adhere to the 'formula' originally set. The objective of this 'creative control' in large measure, is to attract maximal circulation and to create desirable 'marketing implements' for national advertisers of low cost, mass consumed, packaged goods. These procurement techniques have been developed by network managers as part of a highly sophisticated and 'expert' method (harnassed to ratings and other audience measurement data) of constructing and controlling network schedules in such a way as initially to create and subsequently to maintain through a given evening the highest possible circulation and the lowest possible cost-per-thousand. This procurement process is sometimes referred to as the 'slide rule' method of programing and, at present, prevalent in network television."



"Formerly as much as one-half of network evening schedules was composed of programs - mostly half-hour series - produced by independent producers and licensed directly to advertisers. In these cases network managers did not play a direct financial, proprietary or creative role in the production process. The first-run exhibition rights were purchased by advertisers from the independent producers. The approval of network managers as to appropriateness, quality, good taste, decency, etc., was obtained, time was purchased and the programs were exhibited as part of network schedule.

"This kind of procurement had economic advantages for independent producers. Sponsors practically never sought to acquire syndication, foreign sales, or other subsidiary rights in such program series. These rights were almost invariably retained by the independent producers and constituted valuable commercial assets which (either through exploitation by them or sale to other program distributors) contributed to their stability and commercial profitability. Indeed, the importance of these rights to independent producers can best be appreciated from the testimony of several producers that in many, if not most, instances they do not recover their production costs from the network run of a program series but must look to syndication and foreign sales to 'make them whole' and show a profit.





"In recent years (since about 1957-58) the market in which an independent television program producer can sell his product has been progressively contracted. The percentage of independently produced and financed programs in network schedules has declined sharply. Such programs have been crowded out of network schedules by program series - in many cases hour-length film segments - supplied by 'independents' but financed and controlled, both economically and creatively by network managers. On all networks in 1964, 93.1 percent of total evening hours (6 p. m. to 11 p. m. ) was occupied by programs either produced or under the direct economic control of network managers. Only 6.9 percent was independently produced, financed, and licenses directly to advertisers."

(pages 13-14)

. . .

"Network managers insisted in their testimony that rising costs in program production and basic changes in advertising techniques have required them to assume the 'burden' of greater financial and creative control of programing. They say that they must now, to a much greater extent than was formerly the case, undertake the 'enormous' financial risks in providing a program schedule through which national advertisers may 'circulate.' They justify their acquisition of syndication,



foreign sales and other subsidiary rights as 'good business' and just rewards of their 'risk' in financing programing and assuming the 'responsibility' to obtain advertising support. They point out that they 'commit' many millions of dollars in the production and 'purchase' of programs before sponsorship for them has been obtained. They attempt to 'minimize' these 'risks' by financial return to themselves through sharing the producer's 'profits' from network use and subsequent uses of the program and, for the same reasons, acquire syndication and foreign distribution rights when they can. Despite this, they claim to sustain large 'losses' in the production and procurement of programing which must be recouped from time sales.

"As we have seen, the agency executives in 1959 said that it was network managers who initiated the present programing practices in their own interest and presented the resultant 'slotted-in' schedules to advertisers - many of whom had, to that time, followed the practice of providing their own programing - as fait accomplies. However, whomever may be the cart or the horse, the expressed misgivings of network managers that the switch to hour-long programs and multiple sponsorship placed economic burdens on them which threatened their future profitability seem to have been unduly pessimistic. Since that testimony was given in





1962, reported total net income of network managers (from network operations) has reached progressively higher levels and has almost trebled - from \$24.7 million in 1961 to \$60.2 million in 1964." (page 17)

. . . .

"It is indicated that alternate sources of first-run programs appropriate for nighttime exhibition have been drastically reduced, if they are not 'virtually non-existent.' at present. At most, they appear to constitute a mere pittance of the maximum of 'diverse and antagonistic' program sources which a truly competitive national television industry might sustain and support.

"The restrictive control exercised by network managers over network programs is both economic and creative. Also they control the production and supply - and to a considerable degree the distribution of programs in the nonnetwork or syndication market." (page 19)

As a result of the two reports from the Federal Communications Commission, on March 22, 1965, the Federal Communications Commission proposed a new rule called the 50-50 rule which would:

- "(1) eliminate network corporations from the domestic syndication business, and permit foreign distribution by networks of network produced programs only
- (2) prohibit network corporations from acquiring



syndication rights and foreign distribution of  
independently produced programs

- (3) prohibit a network corporation from offering a weekly evening program schedule in which more than 50 per cent of the time, or a total of 14 hours per week, whichever is greater, is owned or controlled by the network. Newscasts, news interviews, special news programs, on the spot coverage of news events, and sustaining programs are excluded. "

The Federal Communications Commission is currently receiving comments from interested parties. Representative Emanuel Celler, Chairman of the Committee on the Judiciary, filed a written comment before the Federal Communications Commission regarding this proposed rule, and while commending the rule as a step in the right direction, he concluded: "There should be no permissive network ownership of programs." (page 3). He further pointed out as his opening two paragraphs:

"This proceeding is long overdue. In 1957, the House Antitrust Subcommittee, in its report on its extended investigation into antitrust and monopoly problems in the television industry, noted the growing proclivity of the networks to abuse their power over broadcast time to extract concessions and profit participation from program producers, or to force an unfair tie-in of network owned





programs on advertisers. At that time the networks already had muscled their way into 67.2 per cent ownership or control of the evening network television schedules. The independent program producer at that time, however, still accounted for 32.8 per cent of the programs.

"Now we see the fruits that have been borne as a result of the failure to heed the Subcommittee's warnings of the need for vigorous action to curb network program abuses. By 1964, 93.1 per cent of all network programming between 6:00 and 11:00 p.m. had become network owned or controlled. The independent programs outside direct network ownership or proprietary control were reduced to a paltry 6.9 per cent."

#### 6. Additional Background of the Television Industry

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In December, 1966, Subcommittee No. 6 to the Select Committee on Small Business, House of Representatives, 89th Congress, 2nd Session, submitted its report entitled Activities of Regulatory and Enforcement Agencies Relating to Small Business (Federal Communications Commission), House Report No. 2344.

The following is a critical excerpt from this report:

"Testimony established that of the 26 prime-time programs not produced by the network as of November, 1965, there were only 2 in which CBS did not own some



interest:

"COUNSEL: There are only two programs that are produced by others and licensed directly to the advertisers, is that correct, sir?

"MR. REYNOLDS. On this chart?

"MR. IANNUCCI. Well, there are two programs. But there are two other programs which are half and half, sir.

"COUNSEL: They are hybrid, that is correct, sir?

"MR. IANNUCCI. Right.

"COUNSEL. In which the producer retains 50 percent in one case, the advertiser in the other, and the network has 50 percent?

"MR. IANNUCCI. I don't know what you are talking about when you talk about those percentages. If I may state it, there are two programs in the schedule which are directly licensed 100 percent to the advertiser and there are two other programs, 50 percent of which or alternate weeks of which are licensed to the advertiser and 50 percent which on alternate weeks of which are licensed to the network for resale purposes.

"COUNSEL. I am trying not to reveal the names of the shows. Are these the two footnotes you are referring to, sir?

"MR. IANNUCCI. I don't know what chart you are





referring to.

"COUNSEL. It is your chart 1.

"MR. IANNUCCI. Our chart 1? The shows I think we are discussing, 'Gomer Pyle' is directly licensed to us by General Foods. 'Andy Griffith' is licensed to us, not licensed but they have a license from the packager and in turn they buy time on our network. Then the 'Smothers Brothers', half of which is acquired by license directly from the packager by Alberto Culver, and on the alternate week we acquire the license for resale purposes, and the other show I think is the 'Lucille Ball show,' in which that same situation as for the 'Smothers Brothers' obtains.

"COUNSEL. So there are only two in which you have absolutely no financial interest.

"MR. IANNUCCI. Well, financial interest doesn't necessarily follow in view of the fact that we have a license from a packager. I don't know what you mean by financial interest. Are you referring to financial interest in the sense that we have a financial interest obviously in the time side of any sale?

"COUNSEL. I am talking first of all, of first network runs, sir. I am referring specifically - and I will use your arithmetic without revealing the name of program - to a program in which profits divided from sales for first running 50 percent to CBS and 50 percent



to the supplier. Programs in which CBS receives 100 percent of the profits -

"MR. IANNUCCI. You are talking program profits now.

"COUNSEL. For openers; yes, sir.

"MR. IANNUCCI. If there is a program profit, which is always -

"COUNSEL. An open question, that is correct, sir?

"MR. IANNUCCI. Yes.

"REP. WELTNER. You have only two shows that fall into the category where the advertiser supplies the whole item, buys the time from the network.

"MR. IANNUCCI. That is right.

"REP. WELTNER. All of the others are subject to some kind of licensing.

"MR. IANNUCCI. Licensing arrangement.

"REP. WELTNER. Or some kind of sharing proposition.

"MR. IANNUCCI. Excuse me, sir?

"REP. WELTNER. Some kind of licensing or some kind of sharing proposition?

"MR. IANNUCCI. A licensing arrangement, and in the licensing arrangement you would cover the aspects of the arrangement as you would in any arrangement.

"REP. WELTNER. And the reason for that is the explanation contained in Mr. Reynold's statement,





insofar as the spreading of risk among advertisers and the avoiding of what he calls the all the eggs in one basket proposition. "

Appellant's Interrogatory No. 17, put to defendant CBS and its answer are set forth below:

"INTERROGATORY NO. 17.

"State the number of television series on the CBS television network during prime time at the start of the 1965-66 television broadcast year that defendant CBS did not have a financial interest in.

"ANSWER TO INTERROGATORY NO. 17.

"There were at the start of the 1965-1966 broadcast season 12 series broadcast during prime time over facilities of CBS Television Network as to which CBS had no right to receive profits or to use or license the series or elements thereof, excepting of course, rights relating to network broadcasts. " [CT 43-73, 136-186].

7. There is a Genuine Issue of Fact as to Whether GF Agreed to Boycott Independently Owned, Controlled and Produced Television Shows and Series for Exhibition During Prime Time.
- 

The facts in the light most favorable to appellant are: GF paid to have eight television pilots made; appellant wrote, directed and produced two of the eight pilots; GF, after viewing the eight



pilots, exercised its option and announced that it would sponsor McGHEE as a television series on CBS television network; GF tried several times to get CBS to exhibit McGHEE as a series but CBS refused; CBS tried to get GF to sponsor two series in which CBS had financial interests and controls (one of which was not even a pilot, but merely a title and idea); GF agreed with CBS that GF would sponsor the CBS shows.

Does this agreement constitute an agreement in restraint of trade? Does this agreement constitute an agreement to boycott? In view of the history and development of CBS' ever increasing percentage of financial interest and control over television shows and series that it exhibits over its network during prime time (supra), and the recognition that this development took place while GF was consistently one of the largest advertisers over the CBS television network during prime time, and that GF was obviously aware of the CBS policy that it would not exhibit shows that it didn't own, and the fact that network television time during prime time is a very limited commodity which has been a seller's market for many years, invites only one conclusion: there is a triable issue of fact involved.

Appellant's sworn recitation of facts relating to McGHEE and P & G and PM Co. are completely uncontradicted in the record and corroborate and confirm the McGHEE facts relative to GF. Briefly stated, the facts are as follows: after GF was unable to get McGHEE on CBS and instead agreed to sponsor two CBS shows, P & G and PM Co. viewed the McGHEE pilot; P & G and PM Co.





told CBS they wished to sponsor McGHEE as a television series during prime time on the CBS television network; CBS refused; CBS tried to get P & G and PM Co. to sponsor a non-existent show in which CBS had financial interests and controls, in the end P & G and PM Co. agreed with CBS that they would sponsor it as a television series on the CBS television network; CBS refused.

The net results of these facts may be summarized as follows: appellant had three national advertisers who were ready, willing, able and desirous of sponsoring McGHEE as a series on network television; McGHEE did not get on the air, but three CBS shows got sponsors; appellant had a national advertiser ready, willing, able and desirous of sponsoring McCLUSKEY as a series on CBS television network; McCLUSKEY did not get on CBS, but another CBS show was sponsored.

Why didn't GF take the McGHEE show to the American Broadcasting Company television network and/or to the National Broadcasting Company television network and sponsor it over their facilities? This subject has a direct bearing on the issue of group boycott, but is also a separate topic as well.

White Motor Co. v. United States, 372 U.S. 253,  
83 S. Ct. 696 (1963);

Klor's v. Broadway-Hale Stores, 359 U.S. 207,  
79 S. Ct. 705 (1959);

Jerrold Electronics Corp. v. Westcoast Broadcasting  
Co., Inc., 341 F.2d 653 (9th Cir. 1965).



8. There is a Genuine Issue of Fact as to Whether GF Has an Exclusive Dealing Arrangement With CBS Relative to Sponsorship of Television Shows and Series Exhibited During Prime Time on Network Television.
- 

Appellant in his verified complaint alleges that appellee GF has an exclusive agreement with CBS whereby GF will sponsor television series during prime time only with the CBS network. Appellee in his motion for summary judgment and the affidavits attached denies this allegation and lists the amount of time they purchase on the other two networks. But this is no answer in that buying spot time is quite different from being the sponsor of record of a series during prime time. Appellant in his answering affidavit in opposition to summary judgment said:

"31. Sponsorship of television series means that the sponsor (advertiser) agrees to pay for 'time and talent' for the show for a set number of shows (usually 26). The sponsor also pays the advertising agency 15% of the time charges. The average cost for a one half hour television show are: \$70,000.00 for talent, \$80,000.00 for time, for a total of \$150,000.00. This means \$3.9 million for 26 weeks.

"32. There are distinct advantages to being a sponsor of a television series as distinguished from 'spot sales.' To name a few: (a) a sponsor identification with the show, e. g. Bob Hope -Chrysler Theatre;





(b) some control over the content of the show, e. g. guest approval, script approval; (c) control of the license to the show; (d) financial control of the show, particularly in succeeding years; and (e) involvement in 'show business. '

"35. I have studied the ratings which reveal who is sponsoring what television series on what network during prime time, and they show that General Foods is a sponsor of record of television series during prime time only on the CBS television network. " [CT 187-235].

Certainly from what has been explained above regarding the discounts given to large national television advertisers who buy many millions of dollars a year worth of television time is ample motivation for the existence of such exclusive dealing contracts between GF and CBS. The more television time GF buys on CBS the cheaper each minute is to GF.

See: FTC v. Proctor & Gamble, 386 U.S. 568 (1967).

9. There is a Genuine Issue of Fact  
as to Whether There is a Forbidden  
Tying Arrangement Between CBS and GF.
- 

Appellant has alleged in substance in his verified complaint that there is an illegal tying arrangement between CBS and GF, and this issue of fact is also inherent in the two points raised immediately above. The tying arrangement is that CBS sells television air time,



and more narrowly CBS sells television air time during prime time. However, if a national advertiser is financially able and wishes to purchase prime time television time to sponsor a television series, said advertiser must sponsor a television series that is financially owned and controlled by CBS. Thus, the sale of television prime time is tied to sponsorship of a CBS owned and controlled television series.

There are a number of decisions which hold that tie-in agreements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market, for the tied product and a not insubstantial amount of interstate commerce is affected." Northern Pacific R. Co. v. United States, 356 U.S. 1, 6, 78 S. Ct. 514 (1958).

See also:

Times Picayune Publishing Co. v. United States,  
345 U.S. 594, 73 S. Ct. 872 (1953);

Standard Oil Co. of Calif. and Standard Stations v. United States, 337 U.S. 293, 69 S. Ct. 1051  
(1949);

United States v. Griffith, 334 U.S. 100,  
68 S. Ct. 941 (1948);

United States v. Paramount Pictures, 334 U.S. 131,  
68 S. Ct. 915 (1948);

International Salt Co. v. United States, 332 U.S. 392,  
68 S. Ct. 12 (1947).





10. There is a Genuine Issue of Fact as to Whether GF Has Conspired, Combined and Agreed With CBS and Other Co-conspirators in Restraint of Trade.
- 

Based on the foregoing points, there is little need to labor this point. Proof at trial that GF has agreed to boycott independently produced and financed television series from sponsorship and exhibition on television during prime time, and/or proof that GF has an exclusive dealing arrangement with CBS; and/or proof that GF and CBS have agreed to forbidden tying arrangements will prove this point also.

11. There is a Genuine Issue of Fact as to Whether GF Conspired With CBS and Other Co-conspirators to Monopolize or Attempt to Monopolize Television Shows and Series Exhibited During Prime Time Over the CBS Television Network.
- 

Based on the foregoing background and the points discussed above, it seems apparent that this is a disputed issue of fact that can only be resolved by a trial on the merits. At this stage of this case, CBS' financial interest and control over virtually every television show and series that is exhibited over its network during prime time must be taken as a fact, and the remaining issue is whether or not GF and other co-conspirators agreed and conspired with CBS to bring about this state of affairs.

GF, to date in this case, seems to prefer to cast itself in



the role of a victim or one sinned against rather than a sinner; but this is not an adequate defense. George Stocking's paraphrase of Pope's poem appears accurate, appropriate and applicable:

"Monopoly is a monster of such frightful men,

"That to be hated needs but to be seen.

"But seen too oft, familiar with her face,

"We first endure, then pity, then embrace."

B. THE DISTRICT COURT ERRED IN  
QUASHING THE SUBPOENA ON MR.  
EBEL CALLING FOR HIS APPEAR-  
ANCE AND TESTIMONY AT THE  
HEARING ON THE MOTION FOR  
SUMMARY JUDGMENT.

---

Edwin W. Ebel, Vice-President for Advertising Services for appellee GF, and named in the complaint as a co-conspirator, gave his affidavit in support of the motion for summary judgment. Mr. Ebel lives and works in the New York, New York area, but appellant was able to find him in Los Angeles, California, and subpoenaed him for the hearing on the motion for summary judgment. On appellee's motion, this subpoena was quashed. No discovery of any kind had been had as to appellee GF.

Rule 43(e) of the Federal Rules of Civil Procedure provides:

"(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly





or partly on oral testimony or depositions. "

Appellant at the hearing on the motion for summary judgment wanted to cross-examine affiant Ebel based upon his affidavit. There is no need for appellant to consume time and words extolling the value, significance and indispensability of the right of cross-examination. Listed below are just some of the questions appellant would have asked Mr. Ebel on cross-examination:

1. Since GF paid some \$800,000 to have eight television pilot films made, and since it rated McGHEE as the best pilot, and since CBS said GF could exhibit McGHEE on its network (according to Mr. Ebel), why wasn't McGHEE put on the air?

2. When you said that you were "particularly interested" in the show COUNTRY COUSINS, what was it you were interested in, as there was no pilot and you had caused your company to spend \$800,000 on pilots and then agreed to sponsor a series that had no pilot?

3. Did you know that CBS had a financial interest in and control over the two shows you agreed to sponsor on CBS as television series?

4. Why didn't you take the McGHEE pilot, or any of the other seven pilots you had paid for, to either ABC or NBC?

5. Although you purchase time on ABC and NBC, isn't it a fact that you are a sponsor of record of television series during prime time only on the CBS television network? Why?

6. Who has the syndication and distribution rights to the



television series GOMER PYLE and THE ANDY GRIFFITH SHOW?

There are also numerous factual conflicts between Mr. Ebel's affidavit, and the three affidavits appellant filed in opposition to the motion for summary judgment.

It was an abuse of discretion for the trial court to quash this subpoena on Mr. Ebel and then grant Mr. Ebel's employer summary judgment on the basis that there was no material fact issue in dispute.

C. THE DISTRICT COURT ERRED IN  
GRANTING APPELLEE'S MOTION  
THAT NO TESTIMONY BE TAKEN  
AT THE HEARING ON APPELLEE'S  
MOTION FOR SUMMARY JUDGMENT,  
AND BY SO DOING QUASHING THE  
SUBPOENA ON MR. LEE RICH.

---

Mr. Lee Rich was the Senior Vice-President in Charge of the Media, Radio and Television Departments of the Benton and Bowles Advertising Agency. His affidavit was filed in support of appellee's motion for summary judgment. Appellant subpoenaed him to attend and testify at the hearing on the motion for summary judgment. On appellee's motion, the District Court ordered that no testimony would be taken at the hearing. Mr. Rich did not move to quash the subpoena served upon him, but the court quashed it anyway.

What was said above as to Mr. Ebel's subpoena is applicable here, and no purpose would be served in repeating it.





D. FINDING OF FACT NO. 5 IS CLEARLY  
ERRONEOUS.

---

Finding of Fact No. 5 recited that:

"5. On or about January 18 and 19, 1965, General Foods viewed the McGHEE pilot and the seven other pilot programs which had been produced for General Foods. None of these pilots was chosen for production as a series at that time because the officers of General Foods wanted to see what programs Defendant Columbia Broadcasting System, Inc. (hereinafter CBS) had to offer before reaching a final decision." [CT 236-240].

We keep in mind that the issue before the District Court was not what are the facts, but are there any disputed issues of fact.

In the affidavit of Mr. Sam Weisbord, Senior Vice-President of the William Morris Agency, Inc., filed by appellant in opposition to the motion for summary judgment, it is stated:

"7. During January and February 1965, I received information from my associates in our New York office and from Mr. McGuire who had been in daily contact with Mr. Lee Rich, that the McGHEE pilot film was their No. 1 candidate to go on the air for General Foods in the fall as a new television series.

"8. General Foods had an option to buy said television series. This option was extended to February



1, 1966 [sic] by which date General Foods could elect to sponsor a television series based on McGHEE pilot film, subject to General Foods obtaining a network time period acceptable to them. On the evening of February 1st, I received a call from Mr. Sol Leon of our New York office, in which Mr. Leon stated that in a phone conversation he had with Lee Rich, Mr. Rich had told Mr. Leon that Benton and Bowles was exercising its option on McGHEE subject to network acceptance of the series in a time spot acceptable to General Foods." [CT 187-235].

In the affidavit of appellant, Don McGuire, filed in opposition to the motion for summary judgment, it is stated:

"19. While in New York in January of 1965, Lee Rich advised me that: defendant General Foods had looked at all 8 of their pilot films and then at a meeting in a club in New York City they voted and ranked in order of their preference the 8 pilot films; at this meeting, the following people were present, Messrs. Ebel, Pratt, Barry, Bunker, Seigelstine, Craig and Rich; McGHEE was voted as their number one choice to become a television series under General Foods sponsorship.

"20. That same evening, I telephoned Ed Ebel at his home in New York and thanked him relative to the selection of McGHEE as their first choice; he advised me that it was his pleasure because McGHEE was far away the best show that they had and it would be on CBS





that year for General Foods.

"21. Within a day or so, Lee Rich telephoned me while I was still in New York and advised me that the pilots had been exhibited to the heads of the various divisions of defendant General Foods (Post Cereals, Maxwell House Coffee, Jello, etc.) at the General Foods offices in White Plains, New York, and all had agreed that McGHEE was far and away the best; he advised me that McGHEE would have to be shown to CBS on 'policy and taste' but there was no question as to the network's acceptance of McGHEE." [CT 187-235].

E. FINDING OF FACT NO. 7 IS CLEARLY  
ERRONEOUS.

---

Finding of Fact No. 7 recites that:

"7. From on or about January 25, 1965, to January 30, 1965, General Foods' officers discussed possible television program arrangements with CBS. During this period, General Foods viewed a CBS pilot called HOGAN'S HEROES. General Foods was also offered sponsorship of a proposed series entitled COUNTRY COUSINS (ultimately retitled GREEN ACRES). The officers of General Foods preferred both HOGAN'S HEROES and GREEN ACRES to any of the eight pilot programs which had been produced for General Foods." [CT 236-240].



This finding of act inspires incredulity and is clearly erroneous in that the officers of GF could not have preferred COUNTRY COUSINS (GREEN ACRES) "to any of the eight pilot programs which had been produced for General Foods" because COUNTRY COUSINS was not even a pilot. CBS in its answer to the complaint admitted that COUNTRY COUSINS was not a pilot. CBS in its answer to appellant's Interrogatory No. 34 swears that: there was no pilot for COUNTRY COUSINS, there was no script, but there was a two page series presentation and a 22 page script outline; no cast had been selected; no director had been selected; there were no contracts between the producer and the production company or between the production company and CBS; no music had been selected; and no budget had been reduced to final form.

Appellant's Interrogatory No. 32 reads in part: "State whether or not defendant CBS ever requested defendant GF to sponsor a television series on CBS television network called COUNTRY COUSINS;" and CBS' answer to this interrogatory reads: "No. A representative of CBS stated to General Foods that a series entitled COUNTRY COUSINS (now GREEN ACRES) might be available for the broadcast of commercial announcements relating to General Foods products."

Also, according to appellant's affidavit:

"30. In the last week of January, 1965, in Los Angeles, California, I exhibited the PRESENTING MONA McCLUSKEY pilot film starring Juliet Prowse, to Mr. Ebel. At the time of the running, Mr. Ebel advised me





that he liked it very much. I asked him if his interest in the McCLUSKEY pilot film in any way lessens his interest in McGHEE and he replied, 'No, McGHEE has always been our number one choice.' Other people were present at the time Mr. Ebel made this statement. Within the next week or so, I was advised by Lee Rich that a big meeting was held at General Foods' offices in White Plains, New York, relative to the relationship between General Foods and CBS." [CT 187-235].

F. FINDING OF FACT NO. 9 IS CLEARLY  
ERRONEOUS.

---

Finding of fact No. 9 recites that:

"9. CBS did not refuse to exhibit McGHEE on its television network, but merely declined to schedule it at a certain time. Had General Foods wished to do so, it could have sponsored McGHEE on the CBS television network by scheduling it on Monday at 9:30 PM," [CT 236-240].

Appellant's affidavit in opposition to the motion for summary judgment states:

"26. Around February 1, 1965, Lee Rich advised me that Tom Dawson of CBS had advised him that James Aubrey of CBS did not like McGHEE and would not accept it for CBS; according to Mr. Rich, Mr. Dawson said to



Mr. Rich that Aubrey's only reason was that he, Aubrey, did not like the show.

"27. Lee Rich shortly thereafter advised me that he had contacted Tom Dawson again, regarding McGHEE, and that Tom Dawson had told Rich that Aubrey was adamant and refused to air McGHEE; Rich asked for a meeting between the General Foods people and James Aubrey and Mr. Dawson called Mr. Rich back and advised that Mr. Aubrey would meet with the General Foods people the following morning in Los Angeles.

"28. Abe Lastfogel, the President of the William Morris Agency, Inc., met with Messrs. Ebel, Rich, Pratt and Barry in Los Angeles prior to their meeting with Mr. Aubrey; and Mr. Lastfogel told them that because General Foods was exclusive to CBS in the sponsorship of television series during prime time and thus could not take their shows elsewhere, that James Aubrey was determined to force General Foods to buy CBS shows only; Mr. Lastfogel urged that General Foods insist on their right to select their own programming.

"29. Messrs. Ebel, Barry, Rich and Pratt, according to Lee Rich, met with James Aubrey in Los Angeles to urge Aubrey and CBS to accept McGHEE but Aubrey refused." [CT 187-235].

Abe Lastfogel, in his affidavit filed in opposition to the motion for summary judgment, swears:





"8. General Foods had an option to buy said McGHEE TV series. I was told by my associate, Mr. Weisbord, that he was told in a phone conversation with other associates in our New York office that General Foods was picking up the series, subject to obtaining acceptable Network time.

"9. Very shortly thereafter, I received a phone call from Mr. Rich, who asked me to be present at a meeting at the Bel-Aire Hotel which was attended by Messrs. Rich, Ebel, Pratt and Barry. They advised me that Tom Dawson of CBS had phoned Mr. Barry and Mr. Rich the night before and advised them that CBS would not schedule the McGHEE series on CBS. The four representatives wanted to explore what should be done by General Foods about trying to get CBS to change its position. The sum and substance of my conversation with them was that if General Foods, with all of its tremendous buying power at CBS, would not get CBS to reconsider and change its position, that there was no way I could be effective with CBS. I suggested that with such buying power General Foods ought to try to place the series on another Network." [CT 187-235].

G. FINDING OF FACT NO. 11 IS CLEARLY  
ERRONEOUS.

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Finding of Fact No. 11 recites that:



"11. General Foods has not agreed to boycott television programs and series in which CBS does not have a financial interest, nor has General Foods agreed or conspired with CBS to the effect, as alleged in the Complaint part V, par. 3, p. 8, 'that no television show or television series will be exhibited on the Defendant CBS television network during prime time unless Defendant CBS has a financial interest in and control of the television show or television series.' General Foods has in the past sponsored and still does sponsor for presentation on the CBS television network programs and series in which CBS has no financial interest." [CT 236-240].

The record in this case does not support this finding. When GF agreed to sponsor two CBS owned and controlled television series, and basically scrap the eight television pilots it had made for some \$800,000, didn't it agree to boycott television series in which CBS did not have a financial interest? This question should only be answered when the history and development of CBS' control and financial interests in television series, and GF's participation in this history and development is fully understood.

This record at this time certainly does not support a finding that GF did not agree or conspire with CBS to the effect that no television series will be shown on prime time on the CBS television network unless CBS has an interest in and control over the series. The findings of the various governmental agencies and committees who have investigated network broadcasting are in accord that by





1964 the networks had a financial interest in over 93% of the shows and series exhibited on network television during prime time. GF has sponsored television series only on the CBS network, and this relationship has continued for a number of years. GF, because of the huge volume of television advertising it does on CBS, realizes substantial discounts, and if GF wished to continue obtaining its discounts and advertising its products by sponsoring television series on the CBS network, then it must have agreed and conspired with CBS as alleged in the complaint.

H. FINDING OF FACT NO. 12 IS CLEARLY  
ERRONEOUS.

---

Finding of Fact No. 12 recites:

"12. General Foods has not agreed to deal exclusively with the CBS television network for its television advertising requirements, nor has General Foods agreed to purchase television time and talent exclusively from CBS." [CT 236-240].

This finding of fact is highly misleading. The sponsorship of television series exhibited during prime time on national television is the issue that is involved in the allegations of exclusive dealings between GF and CBS. Buying "spot time" on another network or daytime television are both vastly different from sponsorship of series during prime time. If the last clause of this finding, relating to time and talent, actually means sponsorship of a television series during prime time, then this is clearly erroneous in



that nowhere in the record is there any evidence that GF sponsors television series during prime time on any network but CBS' television network.

I. CONCLUSION OF LAW NO. 1 IS  
CLEARLY ERRONEOUS.

---

Conclusion of Law No. 1 recites:

"1. The acquiescence by General Foods, at any time, in CBS' refusal to show a particular program does not constitute a conspiracy in restraint of trade or an unlawful agreement under the Sherman Act."  
[CT 236-240].

It is not clear to appellant as to just what is meant by the word "acquiescence" in this conclusion. It is also worth noting that in Finding of Fact No. 9, it specifically states that CBS did not refuse to exhibit McGHEE, and in this Conclusion, we have GF acquiescing in "CBS' refusal to show a particular program".

Appellee would have us believe that it contemplated buying some 15 minutes of time on the CBS television network, and even if GF wanted McGHEE but CBS refused McGHEE, and GF acquiesced in this refusal, it is not a conspiracy in restraint of trade. A closer examination of the facts indicates that GF was contemplating buying 15 minutes of time on the CBS television network; that is 15 commercial minutes per week during prime time for a minimum of 26 weeks. Or to say it another way, that is full sponsorship of five television shows of one-half hour length per week during prime





time, which is nearly one-tenth of a full week's prime time. The estimated cost of time and talent for a one-half hour television show is \$150,000. Thus appellee was contemplating spending some \$150,000 per show for five shows per week, for 26 weeks, which totals \$19,500,000. And, in contemplating how to best spend this sum of money, GF spent some \$800,000 for 8 television pilots. Of the 8 television pilots it wished to sponsor appellant's McGHEE as a series on CBS, but CBS refused, and GF acquiesced in this refusal. Then GF agreed to sponsor two CBS owned and controlled shows as series on the CBS network.

J. CONCLUSIONS OF LAW NOS. 2, 3 and  
4 ARE CLEARLY ERRONEOUS.

---

Conclusion of Law No. 2 recites:

"2. General Foods has not contracted or conspired with CBS to restrain interstate trade or commerce in television programs and series in violation of Section 1 of the Sherman Act."

Conclusion of Law No. 3 recites:

"3. General Foods has not conspired with CBS to monopolize interstate trade or commerce in television programs and series in violation of Section 2 of the Sherman Act."

Conclusion of Law No. 4 recites:

"4. General Foods has not entered into exclusive dealing agreements with CBS the effect of which have been



to lessen competition or tend to create a monopoly in the interstate commerce of television programs and series in violation of Section 3 of the Clayton Act." [CT 236-240].

In view of what appellant has set forth above, it seems apparent that these Conclusions are not supported by the facts or records in this case.

K. CONCLUSION OF LAW NO. 5 IS  
CLEARLY ERRONEOUS.

---

Conclusion of Law No. 5 recites:

"5. Since there is no genuine issue as to the material facts necessary to support any of plaintiff's allegations of antitrust violations on the part of Defendant General Foods, said Defendant is entitled to summary judgment as a matter of law." [CT 236-240].

Appellant has amply demonstrated in both the trial court and in this brief that there are numerous genuine issues as to material facts, and GF is not entitled to summary judgment as a matter of law.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's grant of summary judgment, and its orders quashing the subpoenas on Mr. Ebel and Mr. Rich be reversed.

Respectfully submitted,  
SIMON, SHERIDAN, MURPHY,  
THORNTON & MEDVENE

By: THOMAS R. SHERIDAN  
Attorneys for Appellant





CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Thomas R. Sheridan

THOMAS R. SHERIDAN



ANALYSIS OF COMPLAINT AND ANSWERS

THE COMPLAINT	ANSWER OF	
	GENERAL FOODS	CBS AND CBS FILMS

I

I

I

Jurisdiction and Venue

- |  |            |            |
|--|------------|------------|
| 1. The complaint is filed pursuant to 15 U.S.C. §1-7; 15 U.S.C. §12 et seq.                                | 1. Admits. | 1. Admits. |
| 2. The defendants and each of them maintains offices and does business in Southern District of California. | 2. Admits. | 2. Admits. |

II

II

II

Description of Parties

- |  |   |                             |
|--|---|-----------------------------|
| 1. a. McGuire a citizen of California; is a writer, director and producer. | 1. a. Denies - doesn't know.                | 1. a. Denies - doesn't know |
| b. McGuire wrote, directed and produced McGHEE.                            | b. Admits McGuire connected with the pilot. | b. Denies - doesn't know    |
| c. McGuire wrote, directed and produced MULLIGAN.                          | c. Admits McGuire connected with the pilot. | c. Denies - doesn't know    |
| d. McGuire wrote, directed and produced McCLUSKEY.                         | d. Denies - doesn't know.                   | d. Denies - doesn't know    |

APPENDIX I





- |       |  |       |                        |       |  |
|-------|--|-------|------------------------|-------|--|
| e.    | McGuire is an independent producer of TV and has been on network TV for years.   | e.    | Denies - doesn't know. | e.    | Denies - doesn't know.                                 |
| 2. a. | Def. CBS is a New York corporation, principal place of business in New York.   | 2. a. | Denies - doesn't know. | 2. a. | Admits.  |
| b.    | CBS does business in Southern District of California.  | b.    | Denies - doesn't know. | b.    | Admits.  |
| c.    | CBS operates CBS television network consisting of:<br>1. Five TV stations it owns:<br>New York, Los Angeles,<br>Chicago, Philadelphia, St.<br>Louis.<br>2. 200 affiliated stations in U. S.<br>and otherwise - Canada too. | c.    | Denies - doesn't know. | c.    | Admits.  |
| d.    | CBS syndicates, operates foreign merchandising and distribution of TV shows.   | d.    | Denies - doesn't know. | d.    | Admits.  |
| e.    | CBS has subsidiaries throughout the world.   | e.    | Denies - doesn't know. | e.    | Admits.  |
| f.    | CBS owns CBS Films who produces TV shows - competes with pltf.   | f.    | Denies - doesn't know. | f.    | Admits. But claims CBS Films syndicates, not produces. |
| g.    | CBS owns, has profit participation and investments in TV shows - competes with pltf.   | g.    | Denies - doesn't know. | g.    | Admits.  |
| 3. a. | CBS Films a California corporation, principal place of business in New York.   | 3. a. | Denies - doesn't know. | 3. a. | Admits.  |



- |       |   |       |                        |       |                        |
|-------|---|-------|------------------------|-------|------------------------|
| b.    | CBS Films produces TV shows, competes with pltf.                        | b.    | Denies - doesn't know. | b.    | Denies.                |
| 4. a. | GF is a Delaware corporation - principal place of business in New York. | 4. a. | Admits.                | 4. a. | Denies - doesn't know. |
| b.    | GF does business in Southern District of California.                    | b.    | Admits.                | b.    | Denies - doesn't know. |
| c.    | GF markets packaged foods and grocery products - brands.                | c.    | Admits.                | c.    | Denies - doesn't know. |
| d.    | GF is a national TV advertiser, spends millions a year in prime time.   | d.    | Admits.                | d.    | Admits.                |
| e.    | GF sponsors TV series on CBS and pays CBS for time and talent.          | e.    | Admits.                | e.    | Admits.                |

III III III

Description of Co-Conspirators

- |       |  |       |                        |       |         |
|-------|--|-------|------------------------|-------|---------|
| 1. a. | (Affiliates) CBS owns five TV stations.                                  | 1. a. | Denies - doesn't know. | 1. a. | Admits. |
| b.    | CBS has some 200 affiliated TV stations under contract.                  | b.    | Denies - doesn't know. | b.    | Admits. |
| c.    | CBS' affiliates are co-conspirators.                                     | c.    | Denies - doesn't know. | c.    | Denies. |
| d.    | Any TV station who was an affiliate of CBS since 1960 is co-conspirator. | d.    | Denies - doesn't know. | d.    | Denies. |





2. a. (Advertisers) CBS has con- 2. a. Denies. 2. a. Admits.  
tracts with national TV  
advertisers.

b. CBS has a contract with GF. b. Admits. b. Admits.

c. CBS' national advertisers during c. Denies. c. Denies.  
prime time are co-conspirators.

d. Any national TV advertiser with d. Denies. d. Denies.  
CBS during prime time since  
1960 is a co-conspirator.

3. a. (Ad. Agencies) National advertis- 3. a. Denies. 3. a. Admits.  
ers use agencies in dealing  
with CBS.

b. GF uses ad agencies in dealing b. Admits. b. Admits.  
with CBS.

c. Ad agencies representing national c. Denies. c. Denies.  
advertisers with CBS since 1960  
are co-conspirators.

d. Ad agencies of GF since 1960 are d. Denies. d. Denies.  
co-conspirators.

4. a. (CBS key executives) Frank 4. a. Denies. 4. a. Denies.  
Stanton.

b. William Paley b. Denies. b. Denies.

c. James Aubrey c. Denies. c. Denies.

d. John Schneider d. Denies. d. Denies.



- f. Michael Dann
- g. Hunt Stromberg
- 5. a. (GF key executives) C. W. Cook
- b. Charles G. Mortimer, Sr.
- c. A. E. Larkin, Jr.
- d. James North
- e. Edward Ebel
- f. Charles Pratt

- f. Denies
- g. Denies
- 5. a. Denies.
- b. Denies.
- c. Denies.
- d. Denies.
- e. Denies.
- f. Denies.

- f. Denies.
- g. Denies.
- 5. a. Denies.
- b. Denies.
- c. Denies.
- d. Denies.
- e. Denies.
- f. Denies.

IV

IV

IV

Nature of Trade and Commerce

- 1. a. TV shows on CBS during prime time are in interstate and foreign commerce.

- 1. a. Denies.

- 1. a. Admits.

- b. Prime time is 3-1/2 hours, 7:30 to 11:00 P. M., 7 days a week except summers.

- b. Denies.

- b. Denies.

- c. CBS network prime time are mostly films, made in Southern District of California and sent in interstate commerce to 200 cities in U. S. and elsewhere.

- c. Denies.

- c. Admits.

- d. Network TV by definition is interstate and foreign commerce.

- d. Denies.

- d. Denies.





- |       |  |       |                        |       |                        |
|-------|--|-------|------------------------|-------|------------------------|
| 2. a. | After TV series is on CBS network, it is frequently syndicated worldwide.                            | 2. a. | Denies - doesn't know. | 2. a. | Admits.                |
| b.    | CBS engages in business of worldwide syndication and distribution of TV.                             | b.    | Denies - doesn't know. | b.    | Admits.                |
| 3. a. | GF advertises its products on CBS during prime time.   | 3. a. | Admits.                | 3. a. | Admits.                |
| b.    | GF commercials are films made in New York or California and sent in interstate and foreign commerce. | b.    | Denies.                | b.    | Denies - doesn't know. |

V

V

V

Offenses Charged

- |       |  |       |         |       |         |
|-------|--|-------|---------|-------|---------|
| 1. a. | Beginning in 1960 CBS started policy of not showing TV show or series on its network unless it had a financial interest therein. | 1. a. | Denies. | 1. a. | Denies. |
| b.    | Each year for past five years CBS increased its financial interest in percentage of shows during prime time.                     | b.    | Denies. | b.    | Denies. |
| c.    | For 1965-66 TV season CBS has financial interest in virtually every TV show on its network during prime time.                    | c.    | Denies. | c.    | Denies. |
| d.    | In achieving this, CBS and co-   | d.    | Denies. | d.    | Denies. |



2. Defendants and co-conspirators have conspired to restrain trade of TV shows and series for exhibition on CBS network during prime time. 2. Denies.

3. a. Object of conspiracy: no show on CBS unless CBS had a financial interest in and control of the show. 3. a. Denies.

b. Part of conspiracy to boycott independently produced shows. b. Denies.

c. GF agreed to boycott independently produced shows. c. Denies.

4. a. Part of said conspiracy to have advertisers sponsor shows on CBS during prime time that were produced by CBS Films or produced in conjunction with CBS. 4. a. Denies.

b. CBS not allow advertisers to sponsor shows during prime time that were independently produced by competitors. b. Denies.

5. Part of conspiracy that CBS would get exclusive contracts from advertisers so advertiser would not sponsor shows during prime time on other networks. 5. Denies.

6. In 1964 CBS and GF had exclusive contract whereby GF not to sponsor shows during prime time on other networks; effect lessen competition 6. Denies.

2. Denies.

3. a. Denies.

b. Denies.

c. Denies.

4. a. Denies.

b. Denies.

5. Denies.

6. Denies.





7. Beginning in 1960 CBS monopolize and conspired with debts. 7. Denies. 7. Denies.

and co-conspirators to monopolize commerce of TV shows to be exhibited during prime time on CBS network.

8. a. The monopoly consists of CBS' demand to have a financial interest in and control of every show exhibited during prime time on CBS network. 8. a. Denies. 8. a. Denies.

b. Affiliates have no control over what will become a series and under their contracts with CBS they must take CBS shows even though CBS has a financial interest in the show. b. Denies. b. Denies.

9. All of this activity is in violation of antitrust laws and will continue unless the relief prayed for is granted. 9. Denies. 9. Denies.

VI VI VI

Details of the Offenses Charged

A. Regarding McGHEE and MULLIGAN.

A. A. A.

1. In summer of 1964 GF committed itself to finance 8 TV pilots for the 1965-66 season at a cost of \$816,000. 1. Admits it committed the production of 8 TV pilots in 1964. Denies the amount. 1. Denies - doesn't know.



2.	Benton & Bowles for GF requested in Los Angeles in 1964 that pltf. write, direct and produce 2 of the 8 pilots: McGHEE and MULLIGAN.	2.	Admits B & B on its behalf arranged for the participation of pltf. in the pilots McGHEE and THE JANET LEIGH SHOW.	2.	Doesn't know.
3.	Pltf. wrote McGHEE in Los Angeles in 1964.	3.	Denies - doesn't know.	3.	Doesn't know.
4.	Pltf. directed McGHEE in Los Angeles in 1964.	4.	Denies - doesn't know.	4.	Doesn't know.
5.	Pltf. produced McGHEE in Los Angeles in 1964.	5.	Denies - doesn't know.	5.	Doesn't know.
6.	Pltf. wrote MULLIGAN in Los Angeles in 1964.	6.	Denies - doesn't know.	6.	Doesn't know.
7.	Pltf. directed MULLIGAN in Los Angeles in 1964.	7.	Denies - doesn't know.	7.	Doesn't know.
8.	Pltf. produced MULLIGAN in Los Angeles in 1964.	8.	Denies - doesn't know.	8.	Doesn't know.
9.	CBS and CBS Films had no financial interest in or control over either McGHEE or MULLIGAN.	9.	Denies - doesn't know.	9.	Admits.
10.	Pltf. delivered finished prints of McGHEE and MULLIGAN to def. GF in January, 1965.	10.	Admits prints made available for viewing in January, 1965.	10.	Doesn't know.
11. a.	Def. GF viewed the 8 pilots it had financed.	11. a.	Admits.	11. a.	Doesn't know.





b. Def. GF notified pltf. and William Morris Agency that McGHEE was best and GF would sponsor it as a series on CBS in 1965-66.

b. Denies.

b. Doesn't know.

12. GF requested pltf. to exhibit McGHEE and MULLIGAN for CBS in Los Angeles.

12. Admits they arranged for CBS to see them and others in Los Angeles.

Doesn't know.

13. Pltf. exhibited McGHEE and MULLIGAN FOR CBS in Los Angeles.

13. Denies.

13. Denies, but admits they saw McGHEE in Los Angeles.

14. Pltf. told CBS that GF had selected McGHEE to sponsor on CBS in 1965-66.

14. Denies.

14. Denies, but admits they saw McGHEE in Los Angeles.

15. a. CBS told GF that CBS would not exhibit McGHEE.

15. a. Denies.

15. a. Denies, but admits they saw McGHEE in Los Angeles.

b. CBS told GF that GF should sponsor COUNTRY COUSINS and HOGAN'S HEROES.

b. Denies.

b. Denies, but admits they saw McGHEE in Los Angeles.

16. a. COUNTRY COUSINS (GREEN ACRES) in Feb. 1965 not a pilot, just a title.

16. a. Denies.

16. a. Denies, but admits it was not a pilot.

b. HOGAN'S HEROES in Feb. 1965 was a pilot.

b. Denies.

b. Denies, but admits it was a pilot.

17. a. CBS had a financial interest in and control of COUNTRY COUSINS.

17. a. Denies - doesn't know.

17. a. Denies, admits it had certain rights in it.



b. CBS had a financial interest in and control of HOGAN'S HEROES. b. Denies - doesn't know. b. Denies, admits it had certain rights in it.

18. a. GF with Benton & Bowles met CBS and asked for McGHEE as a TV series. 18. a. Denies. 18. a. Denies.

b. CBS refused and said sponsor b. Denies. Denies.

19. GF agreed with CBS to sponsor 1/2 of COUNTRY COUSINS and 1/2 of HOGAN'S HEROES. 19. Admits that it agreed with CBS to participate in their sponsorship 19. Admits GF agreed to broadcast commercials on these shows.

20. McGHEE viewed by many prospective sponsors. 20. Denies - doesn't know. 20. Doesn't know.

21. Proctor & Gamble and Philip Morris had first call on Monday 9:30 P. M. on CBS. 21. Denies - doesn't know. 21. Denies.

22. a. Proctor & Gamble and Philip Morris viewed McGHEE. 22. a. Denies - doesn't know. 22. a. Denies.

b. They notified CBS that they would sponsor McGHEE on Monday at 9:30 P. M. Denies - doesn't know. b. Denies.

23. CBS refused to exhibit McGHEE and told Proctor & Gamble and Philip Morris if they wanted Monday 9:30 P. M. they should sponsor SELENA. 23. Denies - doesn't know. 23. Denies.

24. SELENA was to star Polly Bergen and at the time was not a pilot. 24. Denies - doesn't know. 24. Denies, but admits that in Feb. 1965 it was not a pilot.





25.	CBS had and has a financial interest in and control of SELENA.	25.	Denies - doesn't know.	25.	Denies, but admits it had 'certain rights' in SELENA.
26.	Proctor & Gamble and Philip Morris refused to sponsor SELENA.	26.	Denies - doesn't know.	26.	Denies.
27.	CBS in Feb. 1965 had a change of top management.	27.	Denies - doesn't know.	27.	Denies but admits in Feb. 1965 changes in personnel of CBS TV.
28.	Proctor & Gamble and Philip Morris approached CBS new management and again requested McGHEE for Monday night on CBS.	28.	Denies - doesn't know.	28.	Denies.
29.	CBS again refused and told them to sponsor HAZEL.	29.	Denies - doesn't know.	29.	Denies.
30.	CBS had obtained the rights to HAZEL which had been on another network and thus had financial control of it.	30.	Denies - doesn't know.	30.	Denies but admits that it obtained certain rights to HAZEL which had been on another network for years.
31.	Proctor & Gamble and Philip Morris agreed with CBS to sponsor HAZEL on CBS on Monday at 9:30 P. M. in 1965-66 season.	31.	Denies - doesn't know.	31.	Denies but admits that they sponsor HAZEL on Monday at 9:30 P. M. during 1965-66.
B. <u>Regarding McCluskey</u>					
32.	Pltf. wrote McCluskey TV pilot in Los Angeles in 1964.	32.	Denies - doesn't know.	32.	Denies - doesn't know.



34.	Pltf. produced McCLUSKEY TV pilot in Los Angeles in 1964.	34.	Denies - doesn't know.	34.	Denies - doesn't know.
35.	CBS and CBS Films had no financial interest in or control of McCLUSKEY.	35.	Denies - doesn't know.	35.	Admits.
36.	In Feb. 1965 Philip Morris viewed McCLUSKEY.	36.	Denies - doesn't know.	36.	Doesn't know.
37.	CBS has contractual relationship with Philip Morris requiring Philip Morris to sponsor TV shows during prime time exclusively on CBS.	37.	Denies - doesn't know.	37.	Denies.
38.	Philip Morris notified pltf., William Morris Agency and Benton & Bowles that they would sponsor McCLUSKEY on CBS during prime time in 1965-66.	38.	Denies - doesn't know.	38.	Doesn't know.
39.	CBS viewed McCLUSKEY.	39.	Denies - doesn't know.	39.	Admits.
40.	CBS told Philip Morris they would not exhibit McCLUSKEY on CBS.	40.	Denies - doesn't know.	40.	Denies.
41.	CBS told Philip Morris to sponsor one of 6 other shows in which CBS had financial interest and control if they wanted to be on CBS.	41.	Denies - doesn't know.	41.	Denies.
42.	Philip Morris withdrew its offer to sponsor McCLUSKEY	42.	Denies - doesn't know.	42.	Denies.





C. Regarding Control

C.

C.

43. CBS Films produces and controls a substantial percentage of shows exhibited on CBS during prime time.

43.

Denies - doesn't know.

43.

Denies.

44. Over past 5 years CBS acquired a financial interest in and control over an ever increasing percentage of shows on prime time until it now has it in virtually every show on 1965-66 season.

44.

Denies.

44.

Denies.

VII

VII

VII

Effects of the Monopoly, Attempt to Monopolize, Exclusive Dealings, and the Unlawful Combinations, Agreements and Conspiracies.

1. The following effects have stemmed from the defts' actions:

a. Competition among the 3 TV networks for national advertising sponsors has been eliminated.

a. Denies

b. National advertisers have been prevented from sponsoring TV shows during prime time on other networks.

b. Denies

c. Competition among the producers of TV shows for prime time has been eliminated

c. Denies



- |    |  |    |         |    |         |
|----|--|----|---------|----|---------|
| d. | Competition among directors of TV shows for prime time has been eliminated.  | d. | Denies  | d. | Denies  |
| e. | Competition among the writers of TV shows for prime time has been eliminated.                                      | e. | Denies  | e. | Denies  |
| f. | Competition among the financial investors and owners in TV shows for prime time has been eliminated.               | f. | Denies  | f. | Denies  |
| g. | Competition among actors cameramen, musicians and production crews of TV shows for prime time has been eliminated. | g. | Denies  | g. | Denies  |
| h. | Competition among distributors of TV shows for prime time has been eliminated.                                     | h. | Denies. | h. | Denies. |
| i. | Competition among syndicators of TV shows for prime time has been eliminated.                                      | i. | Denies. | i. | Denies. |
| j. | Competition among foreign syndicators of TV shows for prime time has been eliminated.                              | j. | Denies. | j. | Denies. |





k. Competition among the studios where TV shows for prime time are made has been eliminated.

k. Denies.

l. Independent production companies of TV shows for prime time have been prevented from selling their shows to national advertisers for airing on CBS.

l. Denies.

m. Independent writers, directors, producers, actors, cameramen, musicians and crews have been prevented from having their work product in TV shows for prime time being aired on CBS.

m. Denies.

n. Independent distributors, syndicators and foreign syndicators of TV shows for prime time have been prevented from distributing and syndicating prime time TV shows.

n. Denies.

o. Competition among the advertising agencies representing national advertisers has been eliminated.

o. Denies.

p. Advertising agencies representing national advertisers have been prevented from dealing with independently produced or

p. Denies.



q. Competition among CBS' affiliates for TV shows for prime time has been eliminated.

q. Denies.

r. CBS affiliates have been prevented from deciding what will or will not become a TV series during prime time.

r. Denies.

r. Denies.

2. The pltf. has been damaged as a direct result of the above described activities of defts.

2. Denies.

2. Denies.

VIII

VIII

VIII

Prayer for Relief.





No. 21643

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

DON MCGUIRE,

*Appellant,*

*vs.*

GENERAL FOODS,

*Appellee.*

---

Appeal From the United States District Court for the  
Southern District of California, Central Division.

---

## APPELLEE'S ANSWERING BRIEF.

---

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**FILED**

SEP 14 1967

WM. B. LUCK, CLERK

SEP 18 1967



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No. 21643

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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DON MCGUIRE,

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*vs.*

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*Appellee.*

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---

## APPELLEE'S ANSWERING BRIEF.

---

### Statement of the Case.

This is an appeal from a summary judgment. The question is whether, if every conflict in the affidavits be resolved in favor of appellant McGuire, he has an antitrust case against General Foods. For that purpose, we first adopt McGuire's description of the facts most favorable to him:

"The facts in the light most favorable to appellant are: GF paid to have eight television pilots made; appellant wrote, directed and produced two of the eight pilots; GF, after viewing the eight pilots, exercised its option and announced that it would sponsor McGHEE as a television series on CBS television network; GF tried several times to

get CBS to exhibit McGHEE as a series but CBS refused; CBS tried to get GF to sponsor two series in which CBS had financial interests and controls (one of which was not even a pilot, but merely a title and idea); GF agreed with CBS that GF would sponsor the CBS shows.” (Appellant’s Br. pp. 63-64.)

We submit that General Foods’ inability to get McGHEE on television does not violate the antitrust laws.

As a second observation, we have to add that we have quoted McGuire’s version, based on his affidavit. But his affidavits consist entirely of hearsay. When the hearsay is deleted, all one has is the case of a potential TV program rejected because it was less appealing than others. We submit that it is not a violation of the antitrust laws to prefer another program.

## ARGUMENT.

### I.

**The Complaint: Appellant's Affidavits and Appellant's Brief All Simply Say That General Foods Tried to Get McGHEE on CBS, but That CBS Would Not Take It. Appellant's Own Affidavits Show That There Is No Triable Issue of Conspiracy, Boycott or Monopoly.**

Hearsay though it be, we start with McGuire's case. For even if all the inadmissible evidence be admitted, there is nothing here.

The gist of the complaint is that CBS had a policy of televising only shows that it owned; that General Foods did all it could to get McGHEE (appellant's show) on the air, and failed, solely because CBS would not let the show on the air. According to the complaint, Procter & Gamble and Philip Morris tried, and had no better luck. Why, on these facts, General Foods is sued, passes our understanding.

In detail, here is appellant's depiction of these events. [We omit his general rhetoric about conspiracy: a motion for summary judgment is not defeated by general allegations in the complaint. (F.R.C.P. 56(e).] Rule 56(e) requires that the appellant present particulars within his own knowledge by affidavit. However, the complaint's allegations are admissions, and usable against appellant.

The complaint alleges that CBS has evolved a policy of placing on television only programs which it owns. Nevertheless, according to the complaint, in the summer



of 1964 General Foods committed itself to finance eight television pilots for the 1965-66 season at a cost of \$816,000. [Clk. Tr. p. 11.] Appellant was the producer of two of these pilots, one named "A MAN NAMED McGHEE," and the other named "MEET MAGGIE MULLIGAN." [Clk. Tr. p. 11, line 29; p. 12, line 8.]

The complaint in paragraph VI-11 then alleges that General Foods picked out McGHEE—saying that General Foods

"... notified plaintiff . . . that McGHEE was the best of the eight television pilots and that they, defendant GF, intended to sponsor 'McGHEE' as a television series on prime time on Defendant CBS's television network for the 1965-1966 television season." [Clk. Tr. p. 12, line 10.]

The complaint then goes on to describe the submission of McGHEE to CBS and in paragraph VI-15 says:

"Defendant CBS notified defendant GF that defendant CBS would not exhibit McGHEE on its television network. . . ." [Clk. Tr. p. 12, line 25.]

On the same page, the complaint describes a suggestion by CBS that another show ought to be put on the air and then describes a further effort by General Foods to get McGHEE on television. At paragraph VI-18, [Clk. Tr. p. 13, line 4] the following allegations appear:

"Defendant GF along with its advertising agency, Benton & Bowles, met with defendant CBS and again advised defendant CBS that they wished to sponsor McGHEE on defendant CBS's television network during prime time *but defendant CBS refused to exhibit McGHEE. . . .*" (Emphasis added.)



Appellant's complaint seems to be that General Foods did not somehow or another succeed in overpowering CBS and compelling CBS to put McGHEE on television. How General Foods was to conquer CBS is nowhere made apparent.

CBS's refusal was ironclad. At paragraphs VI-21, 22 and 23 [Clk. Tr. p. 13] and VI-28 and 29 [Clk. Tr. p. 14], it is spelled out that CBS would not put these shows on the air for either Procter & Gamble or Phillip Morris. We quote:

"21. Procter and Gamble and Phillip Morris Co., national television advertisers, had first call or a priority on the Monday, 9:30 p.m. time slot on Defendant CBS's television network.

"22. Procter & Gamble and the Phillip Morris Co. viewed the 'McGhee' show and notified Defendant CBS that they wished to sponsor 'McGhee' as a television series on the Defendant CBS's television network during primetime in the Monday, 9:30 p.m. time slot.

"23. Defendant CBS again refused to exhibit 'McGhee' on its television network and told Procter & Gamble and Phillip Morris Co. that if they wanted the 9:30 p.m. time slot on Monday evening, they would have to sponsor a television series to be called 'Selena'." [Clk. Tr. p. 13.]

And again,

"27. At this particular time, February, 1965, Defendant CBS experienced a top management upheaval which resulted in the replacing of top management officials.

"28. Procter & Gamble and the Phillip Morris Company approached the new management of De-

fendant CBS and again requested 'McGhee' for the Monday night time slot on Defendant CBS's television network.

"29. Defendant CBS again rejected the 'McGhee' show and told Procter & Gamble and the Philip Morris Company that if they wanted to be on the CBS television network on Monday night at 9:30 p.m. they would have to sponsor a television series called 'Hazel'." [Clk. Tr. p. 14.]

On McGuire's own complaint, CBS's objections to these programs were not something that any advertiser could overcome. And appellant's extended quotation from Congressional Reports, hearsay though they are, seem to drive home the same point. For all of the instances appellant there cites as being "a rerun of the complaint herein" (Appellant's Br. p. 40) are episodes wherein networks forced programs on unwilling advertisers. (Appellant's Br. pp. 38-41.) One has thus squarely presented on the face of the complaint the question: Is it a breach of the antitrust laws to fail, when one does not have the power to control television, to get a show on the air? We cannot believe that it is.

Appellant's affidavits tell the same story.

Appellant Don McGuire, at Clerk's Transcript page 190, line 26, p. 191, line 7, sets forth that in the summer of 1964 he wrote, directed and produced "A MAN NAMED MCGHEE" and "MEET MAGGIE MULLIGAN", two television pilots. General Foods financed these pilots (McGuire was aware that General Foods was financing eight pilots at a cost of \$800,000). [Clk. Tr. p. 191, lines 31-32.] Various people advised Mr. McGuire that "MCGHEE" was General Foods' first choice. [Clk. Tr. p. 193, line 4 and line 12.]

CBS, however, did not like McGHEE. Mr. McGuire says:

“Around February 1, 1965, Lee Rich advised me that Tom Dawson of CBS had advised him that James Aubrey of CBS did not like McGHEE and would not accept it for CBS. . . .” [Clk. Tr. p. 194, line 16.]

Mr. McGuire’s affidavit goes forward to describe General Foods’ attempts to get McGHEE accepted. At page 194, lines 21-27, he said:

“Lee Rich shortly thereafter advised me that he had contacted Tom Dawson again, regarding McGHEE, and that Tom Dawson had told Rich that Aubrey was adamant and refused to air McGHEE; Rich asked for a meeting between the General Foods people and James Aubrey and Mr. Dawson called Mr. Rich back and advised that Mr. Aubrey would meet with the General Foods people the following morning in Los Angeles.”

Thereafter [Clk. Tr. p. 195, line 5] he said that:

“Messrs. Ebel, Barry, Rich and Pratt, according to Lee Rich, met with James Aubrey in Los Angeles to urge Aubrey and CBS to accept McGHEE but Aubrey refused.”

Mr. McGuire follows his own affidavit with that of Abe Lastfogel, president of Wm. Morris Agency. Mr. Lastfogel set forth that he

“. . . received a phone call from Mr. Rich, who asked me to be present at a meeting at the Bel Air Hotel which was attended by Messrs. Rich, Ebel, Pratt and Barry.” [Clk. Tr. p. 199, line 5.]



Mr. Lastfogel's affidavit goes on to say:

"They advised me that Tom Dawson of CBS had phoned Mr. Barry and Mr. Rich the night before and advised them that CBS *would not schedule the McGHEE series on CBS*. The four representatives wanted to explore what should be done by General Foods about trying to get CBS to change its position. The sum and substance of my conversation with them was that if General Foods, with all of its tremendous buying power at CBS, could not get CBS to reconsider and change its position, that there was no way I could be effective with CBS." (Emphasis added.) [Clk. Tr. p. 199, line 7.]

To sum up, then, appellant's affidavits are like his complaint. Both set forth the same tale: that General Foods paid for Mr. McGuire's television pilot: that General Foods tried to get Mr. McGuire's pilot onto television: that General Foods could not get Mr. McGuire's pilot on television. We do not understand, this being so, what General Foods is doing in this case. We understand clearly enough that Mr. McGuire claims that the reason General Foods could not get McGHEE on television is that CBS had a policy of taking on only shows it owned. But Mr. McGuire could not have set forth in plainer language the manner in which General Foods did its best. If, to repeat the language of Mr. Lastfogel's affidavit, filed on behalf of appellant, "... General Foods, with all of its tremendous buying power at CBS, could not get CBS to reconsider . . .", how can plaintiff complain that General Foods conspired against appellant (or anyone else)?



The principal argument, such as it is, supporting the claim of conspiracy, appears at page 80 of appellant's brief, in connection with its attack on Finding 11 [Clk. Tr. p. 238] that "General Foods has not agreed to boycott television programs and series in which CBS does not have a financial interest . . ."

We quote appellant (Appellant's Br. p. 80):

"The record in this case does not support this finding. When GF agreed to sponsor two CBS owned and controlled television series, and basically scrap the eight television pilots it had made for some \$800,000, didn't it agree to boycott television series in which CBS did not have a financial interest?"

The short answer is: No. To repeat, appellant's own affidavits say that "With all of its tremendous buying power at CBS", General Foods still "could not get CBS to reconsider and change its position" and run McGHEE. And according to appellant's complaint, Procter & Gamble and Philip Morris were also unable to get CBS to run McGHEE. To advertise on CBS, using a program which was going to be on CBS, is not a boycott of a program which was not going to be on CBS.

Essentially the same argument appears at pages 63-64 where appellant says that there is an issue about boycott. Underlining this whole chain of argument seems to be the notion that if I buy a Plymouth, I am thereby boycotting Ford and Chevrolet. This is not a boycott: there is no evidence of boycott in this record. A boycott is an agreement of two or more people not to patronize a third. There is no evidence in this record, even in McGuire's affidavits, that General Foods agreed with CBS not to patronize McGuire: the evidence in

the appellant's own affidavits is that General Foods tried to get McGuire's program on the air and failed. This is no conspiracy: this is no boycott.

The affidavit of Ed Ebel specifically sets forth that General Foods did not boycott independently owned programs. At Clerk's Transcript page 94, line 2:

“. . . CBS is presently running, for General Foods, both ANDY GRIFFITH and GOMER PYLE, neither of which is owned by CBS.”

And again [Clk. Tr. pp. 96-97, lines 25-1]:

“17. General Foods has never agreed with CBS to monopolize television productions for the benefit of CBS (or otherwise). Such a monopoly would be seriously injurious to General Foods. In the past, such an arrangement would have prevented the development of two of our most effective advertising vehicles, THE ANDY GRIFFITH SHOW and GOMER PYLE, both of which were independently produced.”

The finding of no boycott is sustained: there is no affidavit to the contrary: indeed, hearsay and all, McGuire's affidavit, Lastfogel's affidavit—all are to the effect that General Foods did *not* boycott: all say that General Foods tried to patronize McGuire but was prevented. On McGuire's own showing, accepting all his hearsay, there is no conspiracy: no boycott. That, we submit, disposes of the claim that there is an issue of fact over conspiracy (Appellant's Br. p. 24): over boycott (*Ibid.* p. 24 and p. 80): or attempt to monopolize. (*Ibid.* p. 24.)

II.

**McGuire's Affidavits Are in Fact All Hearsay: the Affidavits Filed in Support of the Motion for Summary Judgment, Which Are Not Hearsay, Show That McGHEE Was in Fact Not Televised Because Other Programs Ultimately Appeared More Attractive. They Set Forth Facts, Not Denied, Showing No Conspiracy: No Attempt to Monopolize: No Boycott.**

This lawsuit would indicate that "Hell hath no fury like an author scorned." And an author scorned, rather than any antitrust violation seems to be what produced this case. The affidavits filed in support of the motion for summary judgment, which in each instance carefully comply with Rule 56(e), disclose that McGHEE ultimately gave way to other programs which were preferred: doubtless, from the author's point of view, the worst of all evils, but no violation of the antitrust laws.

Edwin W. Ebel was vice president for advertising services for General Foods. His affidavit recites that he has personal knowledge of the facts set forth in his affidavit. [Clk. Tr. p. 91, line 8.] It is supported by the affidavits of Charles Pratt, Charles Barry, and Lee Rich, each of whom also had personal knowledge of the facts. [Clk. Tr. pp. 98-113.] These affidavits show that during the spring of 1964 General Foods arranged for the production of eight sample television programs, intending to use not all but the number needed, if any, to supplement carryover programs from the prior year. On January 18th and 19th, samples were viewed. In general, McGHEE received the best reception. [Clk. Tr. pp. 99; 105; 109.] No decision was made, because it



was necessary that the films be shown to various General Foods Divisions, and because General Foods did not yet know what CBS had to offer. [Clk. Tr. pp. 92; 99; 109.]

Thereafter, Messrs. Ebel, Lee Rich of Benton & Bowles, Charles Pratt of General Foods, Barry of Young & Rubicam, went to California, and viewed a CBS pilot called HOGAN'S HEROES and discussed a program which was then in the discussion stage only, at that time called COUNTRY COUSINS, later called GREEN ACRES. [Clk. Tr. pp. 92-93.] Of the General Foods group, Barry and Pratt thought that HOGAN'S HEROES was a better show than any of the pilots developed by General Foods. [Clk. Tr. p. 92, line 26.] Ebel was initially of the view that since it was set in a prison camp, it would be a poor vehicle for selling foods. [Clk. Tr. p. 92, line 28.] Ultimately, all agreed that it was the best available. [Clk. Tr. pp. 92-93.] COUNTRY COUSINS was of interest because of its producer, and because CBS intended to give it a highly desirable spot. [Clk. Tr. p. 93, lines 8-11.]

The ultimate decision with respect to CBS's programming necessarily finally rests on CBS. [Clk. Tr. p. 91, lines 10-11.]

James Aubrey of CBS did not like McGHEE. [Clk. Tr. p. 93, line 22; p. 111, line 9.] But while Aubrey did not like McGHEE, he did not refuse it, but "declined to schedule them [any of these shows—McGHEE and others] at times during which he felt he must run what were in his opinion stronger shows, in order to meet the competition of the other major networks." [Clk. Tr. p. 93, lines 26-30.]



Ultimately, McGHEE dropped out of consideration between January 25 and February 11. In detail, this whole story was described by Mr. Ebel as follows:

"6. During the week of January 25, Mr. Pratt of General Foods, along with Messrs. Rich and Barry of Benton & Bowles and Young & Rubicam, respectively, and I, met in Hollywood with Mr. James Aubrey and other representatives of CBS to discuss General Foods' programming for the 1965-66 season. The CBS group viewed our pilots and we in turn viewed the pilots which CBS was offering. Of the four CBS pilots, only one interested us. This was HOGAN'S HEROES, which was received enthusiastically by all of our group, with the possible exception of Mr. Rich. Mr. Barry and Mr. Pratt expressed the opinion at the time that HOGAN'S HEROES was a better show than any of our own pilots. My own first impression was that it might not be a good vehicle for selling foods, since it was set in a prison camp, but that any possible disadvantage along this line would probably be offset by its potential as an audience-getter. We told Mr. Aubrey at one of our many meetings during this period that we would like to sponsor HOGAN'S HEROES. Mr. Aubrey was firm in wanting HOGAN'S HEROES scheduled for Friday nights at 8:30, but said that he was willing to offer it to General Foods for that time period.

"7. In addition to the pilot programs which he presented for our examination, Mr. Aubrey offered us partial sponsorship of a show entitled COUNTRY COUSINS (later re-titled GREEN

ACRES). I was particularly interested in this show because it was to be written and produced by Mr. Paul Henning, who had scored two successes during the 1964-65 season with BEVERLY HILLBILLIES and PETTICOAT JUNCTION. In addition, COUNTRY COUSINS was attractively scheduled. Mr. Aubrey told us that he planned to put it on between BEVERLY HILLBILLIES and THE DICK VAN DYKE SHOW on Wednesday nights. Both of these shows have been very successful, which makes the spot between them a very desirable one. Furthermore, it is my recollection that Mr. Henning was willing to do COUNTRY COUSINS only if it would be run in the Wednesday evening slot following BEVERLY HILLBILLIES. Thus, it was not possible to move COUNTRY COUSINS to another time slot nor move another program into the time slot scheduled by CBS for COUNTRY COUSINS.

“8. Concerning our pilots, Mr. Aubrey stated that he did not like McGHEE, because it had little potential for continuity. He also felt that neither THE BARBARA RUSH SHOW nor SAM AND SALLY would be successful. However, at no time did he refuse to run any of these shows. He merely declined to schedule them at times during which he felt he must run what were in his opinion stronger shows, in order to meet the competition of the other major networks. He made it clear, for example, that General Foods could broadcast SAM AND SALLY or McGHEE in its traditional spot at 9:30 on Monday nights. Neither did Mr. Aubrey take the position that CBS would

not run programs which it did now own. In fact, CBS is presently running, for General Foods, both ANDY GRIFFITH and GOMER PYLE, neither of which is owned by CBS.

"9. CBS has occasionally refused to run television programs which we proposed, and we have occasionally, but not always, acquiesced in these refusals. For instance, CBS originally did not want to run GOMER PYLE, but finally did accept it at my insistence. On another occasion, CBS refused to exhibit a proposed show starring Eve Arden on grounds of program suitability. We recognize that CBS necessarily has final responsibility for its programming. While we occasionally do not agree with their opinions of our shows, we would be equally unhappy if they did not continue to exert their best professional judgment to achieve the most attractive possible schedule, since the success of the shows which we sponsor depends in part upon the success of the shows which surround them.

"10. Network television time is planned on the basis of advertising minutes. Three advertising or commercial minutes are equal to a half-hour show, in the hours 7:30 through 11:00 PM. We had originally planned to schedule 15 commercial minutes in those hours for the 1965-1966 season. However, we eventually found it necessary to cut this to 12 minutes. It was at this time, between the week of January 25 and our February 11 meeting with Mr. Aubrey in New York, that McGHEE dropped out of consideration. The decision involved a combination of factors including the reduction of our requirements and the time avail-



able. I began by blocking in the existing General Foods shows that we planned to retain and then considering the alternatives for additional material. For example, I was not originally interested in 8:30 PM on Fridays but became interested after seeing HOGAN'S HEROES and learning that CBS had HOGAN'S HEROES scheduled for that hour. By the process of blocking selected programs into our total 12-minute requirement, we eventually came up with the following: THE ANDY GRIFFITH SHOW (a holdover General Foods show) (3 minutes); GOMER PYLE (another holdover General Foods show) (3 minutes); HOGAN'S HEROES (1½ minutes); COUNTRY COUSINS (1½ minutes); and LASSIE (1½ minutes).

"11. This left us with 1½ minutes to fill, which we tentatively planned to use at 9:30 on Monday nights. The most likely candidates for the slot were McGHEE and SAM AND SALLY. These would have been our own shows. Full sponsorship of a half-hour show amounts to 3 commercial minutes. Since this would have brought our total to 13½ commercial minutes, which was 1½ minutes more than we had been able to sell to our product divisions, we would have been faced with the problem of selling partial sponsorship of an untried show to another advertiser. An element of the decision was that our two advertising agencies, Benton & Bowles and Young & Rubicam, were apparently irreconcilably divided as to which of these two shows should be used.



“12. About that time, however, an alternative solution became available. In previous years, we had sponsored I’VE GOT A SECRET. We had not given it much consideration for the 1965-1966 season because it had been scheduled for 10:00 PM Tuesday night which we were not willing to accept. But when CBS rescheduled it to appear at 8:00 P.M. on Mondays, it again became attractive to us, especially since it is an inexpensive show with proven drawing power and the best buy for us. At no time did we ever agree to buy or pick up the option on a McGHEE series.” [Clk. Tr. pp. 92-95.]

On the basis of these affidavits, the Court made Findings of Fact Nos. 5, 6, 7, 8 and 9, of which appellant has attacked 5, 7 and 9 at pages 73 through 79 of his brief. In general, the findings follow, although in more compact form, the description of events set forth in the affidavits above.

Basically, the argument on the findings is that whereas these findings say that General Foods had not finally committed on McGHEE, and that CBS did not reject McGHEE, appellant’s affidavits say the contrary. (Appellant’s Br. pp. 73-79.) (Before the trial court, appellant also urged that there were issues of fact on these points: Appellant’s Brief pages 33-34: they do not list these points as issues of fact at this time. Appellant’s Brief pages 23-24 claims that there are certain genuine issues of fact, but does not mention these points.)

At any rate, the difficulty with the argument is that appellant’s affidavits consist almost totally of inadmissible evidence.

Rule 56(e) requires that:

“. . . Supporting and opposing affidavits shall be on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.”

Appellant claims that CBS refused to show McGHEE. In respect to the refusal, McGuire’s affidavit is that “. . . Lee Rich advised me that Tom Dawson of CBS had advised him that James Aubrey of CBS did not like McGHEE and would not accept it for CBS. . . .” [Clk. Tr. p. 194, lines 16-18.] This is hearsay at three removes: McGuire testified as to what Rich told him about what Dawson told him that Aubrey had told him.

The affidavit continues in the same vein. The next paragraph says that “Lee Rich . . . advised me . . . that Tom Dawson had told Rich that Aubrey was adamant. . . .” (*Ibid.* lines 21-23) In the following paragraph one has McGuire’s hearsay as to what was supposed to have taken place at a meeting which he did not attend, (*Ibid.* pp. 194-195) and that is all there is on CBS’s refusal. The same comment must be made with respect to the affidavit of Abe Lastfogel. The essential allegations contained therein are in paragraphs 7, 8, and 9 of the affidavit, at pages 198-199 of the Clerk’s Transcript. Again, the material is entirely hearsay. “I was advised . . .” “I received information . . .” “I was told . . .” “I was advised”—these are the words preceding every paragraph. And there follows the affidavit of Sam Weisbord [Clk. Tr. pp. 201-202], wherein paragraphs 7 and 8 set forth that he received “information from my associates”, and



in the following paragraph, the content of a call from “Mr. Sol Leon of our New York office . . .” There is not a word that is not hearsay on the whole subject. There is not a word of admissible evidence that CBS refused McGHEE: let alone evidence that General Foods conspired.

The alleged conflict over whether McGHEE was General Foods’ “first choice” is even more ephemeral.

It is perfectly clear that there was a point in time when McGHEE was General Foods’ first choice, and General Foods’ affidavits show this. [Affidavit of Charles Pratt, ¶ 4, Clk. Tr. p. 99; Affidavit of Charles Barry, ¶ 5, Clk. Tr. p. 105.] It is equally clear, as we have set forth above, that ultimately it lost this position. The affidavit of McGuire shows also that there was a time when McGHEE was General Foods’ first choice. It also is clear, from McGuire’s affidavit as with ours, that actual exercise of the right to put the show on the air required the exercise of an option by General Foods. [McGuire: Clk. Tr. p. 191, lines 16-17; Weisbord, Clk. Tr. p. 202, line 1.] On that point, our affidavits are unequivocal that the option was never exercised. [Clk. Tr. p. 95, lines 30-31.]

And the showing of McGuire on this point to the contrary is entirely hearsay: by McGuire [Clk. Tr. p. 194, line 12] that he “was advised by Mr. Weisbord . . . that *he had been advised* (!! ) that General Foods had picked up the option. . . .”, and by Weisbord [Clk. Tr. p. 202, line 5] that he “received a call from Mr. Sol Leon of our New York office. . . .” to the same effect. There is nothing here.

Beyond this, all these “conflicts”—(conflicts between admissible and inadmissible evidence) do not matter

anyway. It does not make a particle of difference, as against General Foods, whether General Foods ultimately decided that it liked other programs better than McGHEE, or whether it tried to get McGHEE on CBS, and failed because it could not. In either event, it is not liable. Because we are concerned with a motion for summary judgment, and because the two descriptions make no difference, we propose to write much of the balance of this brief on the assumption that the hearsay contained in the McGuire affidavits is somehow or other admissible, for it seems to us in any event, there is no possible basis for liability on General Foods. Yet we do wish to point out that appellant's affidavits contain nothing in the way of admissible evidence to contradict the affidavits of Messrs. Ebel, *et al.*

And we point out again that Mr. Ebel has expressly set forth [Clk. Tr. p. 96, line 1] that General Foods has not agreed to boycott programs produced by competitors of CBS: that General Foods uses independently produced programs (GOMER PYLE and ANDY GRIFFITH): that General Foods has not agreed to a CBS "monopoly": that indeed, such a monopoly is strongly contrary to General Foods' interest [Clk. Tr. p. 96, line 17, *et seq.*] because of the value of such programs as GOMER PYLE to it.

Likewise, conspiracy is expressly denied. [Clk. Tr. p. 97.] And Mr. Ebel's affidavit that there is no conspiracy, and no boycott, is not contradicted, either by hearsay or otherwise in any of appellant's affidavits. Indeed it is endorsed by appellant's Congressional hearsay: which identifies GOMER PYLE and ANDY



GRIFFITH as two of the only three programs on CBS in which CBS did not have an interest.\* (Appellant's Br. p. 61.)

Again we say, appellant has pointed to no evidence of conspiracy, no evidence of boycott, on the part of General Foods. There is no issue: an author's dis-appointment does not violate the Sherman Act.

### III.

#### **No Antitrust Claim Can Be Founded on General Foods' Inability to Persuade CBS to Put McGHEE on the Air: There Is No Issue of Fact on Conspiracy.**

If CBS has a policy of putting only shows it owns on the air, and if that policy is illegal, then appellant has his remedy against CBS.<sup>1</sup> But how does anyone else get into the act?

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\*The answers to appellant's interrogatories identify 12 such programs, not two. [Clk. Tr. p. 145, lines 5-10]. Whichever figure is right, General Foods remains as a patron of some of these programs: no conspirator against them.

<sup>1</sup>We here assume the truth of McGuire's claim that CBS excludes independent shows. We make this assumption solely *arguendo*. Both General Foods and CBS have filed answers denying this allegation (and all the material allegations of the complaint). [Clk. Tr. pp. 20 and 32.] General Foods has filed affidavits in connection with its motion for summary judgment which show that the door to independents was not closed: it sponsors independently produced shows. [Clk. Tr. pp. 93-94.] As will be seen below (Part IV hereof), appellant has filed no admissible affidavit to the contrary. CBS has had no opportunity as yet to present evidence, affidavits or argument since it was not a party to the motion which led to this appeal. CBS has advised the trial court that it will offer evidence at the appropriate time to disprove the facts alleged by appellant. [See Clk. Tr. pp. 280-281.] We do not intend, either by assuming the truth of any fact or positing arguments on any factual assumption, to prejudice anyone's defense. Our point at the present time is that even if those allegations were true, they state no claim against General Foods.

The complaint, in paragraph 5 [Clk. Tr. p. 8] says that beginning in 1960 CBS adopted a policy that it would not exhibit television shows which it did not own. The complaint then goes on and talks about an unlawful conspiracy to create a monopoly. And it defines the unlawful conspiracy and attempt to monopolize as “. . . the continuing efforts, insistence and demand of defendant CBS that it have a financial interest in and control of every television show and television series exhibited on its television network. . . .” [Clk. Tr. p. 10, line 27.] This would seem to be a one-man conspiracy: a contradiction in terms. In order to find some conspirators, appellant defines as co-conspirators “. . . all of those national television advertisers who . . . agree to advertise their products on defendant CBS’s television network. . . .” [Clk. Tr. p. 6, line 10.] And similarly, every advertising agency involved in any such program is defined as a co-conspirator. [Clk. Tr. p. 6, line 21.] This is a conspiracy of monumental proportions: perhaps in the same sense, all who voted for President Johnson might have been described as conspirators against Senator Goldwater.

It is apparently plaintiff’s theory that CBS’s policy was illegal, and therefore, that every person who used CBS’s facilities became a co-conspirator. Thus, on appellant’s theory, during the days of the Electric conspiracy, every lady who purchased a refrigerator was a co-conspirator. Can this be the law?

The Supreme Court had that proposition before it in

*Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S. Ct. 400 (1927).



That was a suit by a photographic materials dealer against Eastman Kodak, charging an attempt to monopolize on the part of Eastman. The defendant urged that the plaintiff, the dealer, had participated in contracts by which Eastman sought to achieve its monopoly. The court overruled the argument, stating that:

“There was . . . evidence . . . that the plaintiff had complied with the defendant’s restricted terms of sale merely for the reason that otherwise it could not purchase or secure the goods necessary in the conduct of its business.”

273 U.S. at 377, 47 S. Ct. at 404-405.

The same thesis appears in

*Charles A. Ramsey Co. v. Associated Bill Posters*, 260 U.S. 501, 43 S. Ct. 167 (1923).

That case involved an association of bill posters that had established an agreement which included, among other provisions, the provision that members would deal only with solicitors of advertisers holding licenses from the association. The plaintiff was one of those who had obtained a license, in order to do business. He later brought suit against the association. The claim that he was a participant in this conspiracy was summarily disposed of with the observation that:

“We find no adequate support for the claim that plaintiffs were parties to the combination of which they now complain.”

260 U.S. at 512, 43 S. Ct. at 168.

The proposition thus established that a mere customer of a monopoly: a mere person who deals with a monopoly, is no conspirator, is plainly applicable here. The books are full of cases involving companies who have

purchased from, or sold to monopolies, conspirators or the like. Uniformly, they allow recovery by the person dealing with the violator: it is not even contended in these cases that a customer is a conspirator.

*Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 68 S. Ct. 996 (1948);

*Bigelow v. RKO Radio Pictures*, 150 F. 2d 877 (7th Cir. 1945); rev'd, 327 U.S. 251, 66 S. Ct. 574 (1946), on grounds which strengthen the case as authority on the point here under discussion;

*Banana Distributors v. United Fruit Company*, 162 F. Supp. 32 (S.D. N.Y. 1958); partially reversed on unrelated and nondispositive grounds, 269 F. 2d 790 (2d Cir. 1959).

Such a recovery is not reconcilable with the assumption that the customer is a part of the conspiracy.

In the motion picture industry exhibitors of motion picture films, had in many cases been customers of distributors on the distributor's illegal terms. In virtually scores of these cases a recovery was accomplished. Because an exhaustive list of these cases would fill pages, only a few representative examples are set forth here.

*Loew's, Inc. v. Cinema Amusements*, 210 F. 2d 86 (10th Cir. 1954);

*Tivoli Realty, Inc. v. Paramount Pictures*, 209 F. 2d 41 (5th Cir. 1954);

*Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 193 F. Supp. 401 (S.D. N.Y. 1961);

*County Theatre Co. v. Paramount Film Distrib. Corp.*, 146 F. Supp. 933 (E.D. Pa. 1956);



*Sablosky v. Paramount Film Distrib. Corp.*, 137 F. Supp. 929 (E.D. Pa. 1955);

*Leonia Amusement Corp. v. Locw's, Inc.*, 117 F. Supp. 747 (S.D. N.Y. 1953);

*Don George, Inc. v. Paramount Pictures*, 111 F. Supp. 458 (W.D. La. 1951);

*Christensen v. Paramount Pictures*, 95 F. Supp. 446 (D. Utah 1951);

*DeLuxe Theatre Corp. v. Balaban & Katz Corp.*, 95 F. Supp. 983 (N.D. Ill. 1951);

*Mission Theatres v. Twentieth Century-Fox Film Corp.*, 88 F. Supp. 681 (W.D. Mo. 1950).

All that is asserted against General Foods in this case is that General Foods wanted to put McGHEE on CBS: that CBS would not put it on, and therefore that General Foods had to take the programs that CBS was willing to put on. If that makes General Foods a conspirator, then surely every one of the companies listed in the cases above who were allowed to maintain actions as antitrust plaintiffs, because they were not considered to be parties to antitrust violations, could not have prevailed. As a matter of sheer common sense, the proposition that if I buy spinach because all the local grocery store has is spinach, I am thereby a conspirator against the carrot grower, is its own answer.

The law is clear that there is no "right" to buy time: no right, in an advertiser, to control programming. The Federal Communications Act leaves program control entirely in the hands of the licensee, subject to F.C.C. review.

*Massachusetts Univ. Com. v. Hildreth & Rogers Co.*, 183 F. 2d 497 (C.A. 4th 1959).

And see,

*N.B.C. v. U.S.*, 319 U.S. 190, 204-205, 63 S. Ct. 997, 1004 (1943).

If it was CBS's policy to run only its own shows: if it imposed that policy on all who wished to advertise, so that they could not have the benefit of CBS television without acceding, and if their policy was illegal, the advertisers were the victims: not the offenders. When General Foods spent \$800,000, as plaintiff alleges, on programs of its own, all foreclosed from TV by CBS's policy, General Foods might conceivably complain over that policy. But it can hardly be sued as a conspirator.<sup>2</sup>

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<sup>2</sup>We cannot help but add that it seems singularly unlikely that such a policy would violate the antitrust laws. Whether a store-keeper chooses to sell his own, or someone else's wares, would seem to be his affair. Whether a magazine owns outright the stories it prints, or leaves republication rights in the author, would not seem to be an antitrust problem. Whether CBS sells time only (like space in a magazine) or provides the programs as well, would seem analogous. The Congressional Committee Reports described by appellant at pages 34 through 63 of his brief suggest that any change in the *status quo* falls in the rule-making jurisdiction of the F.C.C.: indeed it appears affirmatively that a rule restricting network ownership of programs to 50% has been proposed by the F.C.C. (Appellant's Br. p. 57). Doubtless, in considering such a rule, the F.C.C. must consider whether the public interest is better served by network or sponsor: *i.e.*, advertisers' selection of programs. It would not seem that this is an area adapted to peremptory court interference. Supervision of the quality of television programming is an authority vested in the F.C.C. through its licensing power: diversification of control is one of the factors considered. (See *McClatchey Broadcasting Co. v. F.C.C.*, 239 F. 2d 15 (D.C. Cir. 1956)) If the court undertook to explore this problem, it would have to consider whether, unlike the situation in *United States v. R.C.A.*, 358 U.S. 340, 79 S. Ct. 457 (1959), this would appear to be a case where primary jurisdiction



Under all these cases, if the appellant were able to demonstrate that the refusal to use appellant's show is a violation of the antitrust law, General Foods is more accurately numbered among the victims of that refusal, rather than among the violators of the law.

*Ring v. Spina*, 148 F. 2d 647 (2d Cir. 1945);  
*Hartford Empire Co. v. Glenshaw Glass Co.*,  
47 F. Supp. 711 (W.D. Pa. 1931).

But, by accepting what it cannot change, General Foods cannot be said to be conspiring to promote CBS's programs. Its alternatives, on appellant's own showing—short of going into the television business itself—would be either to “conspire” to promote NCB's programs or to “conspire” to promote ABC's programs, if advertising constitutes a conspiracy. If it wishes to advertise on network television at all, General Foods has no choice but to deal in terms of the requirements of the networks.

In the words of the Second Circuit Court of Appeals, General Foods

“ . . . is precisely the type of individual whom the Sherman Act seeks to protect from combina-

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rests in the F.C.C. (See generally on Primary Jurisdiction 3 Davis on Administrative Law, p. 1 *et seq.*)

We stop here now: if the legality of CBS's alleged practice of taking only its own shows is to be discussed, clearly the order allowing an interlocutory appeal ought to be reversed, and this appeal deferred until the case against CBS is disposed of. *Robbin v. American University*, 330 F. 2d 225 (D.C. Cir. 1964); *Panichella v. Pennsylvania R.R.*, 252 F. 2d 452 (3d Cir. 1958); *Sears, Roebuck & Co. v. MacKay*, 351 U.S. 427, 436, 76 S. Ct. 895 (1956); *Cott Beverage Corp. v. Canada Dry Ginger Ale, Inc.*, 243 F. 2d 795 (2d Cir. 1957); *Flynn & Emrich Co. v. Greenwood*, 242 F. 2d 737, 741 (4th Cir. 1957), *cert. den.* 353 U.S. 976 (1957). And see the note of this Court in *Century Investment Corp. v. United States*, 277 F. 2d 247, 250 (9th Cir. 1960), disapproving of certificates allowing interlocutory appeals when productive of successive appeals on the same issues.

tions fashioned by others and offered to such individual as the only feasible method by which he may do business.”

*Ring v. Spina*, 148 F. 2d 647, 653 (2d Cir. 1945).

And if, in this action, General Foods were suing CBS, it would not be barred by the *in pari delicto* doctrine;

*Kiefer-Stewart v. Seagram & Sons*, 340 U.S. 211, 71 S. Ct. 259 (1951);

*Bales v. Kansas City Star Company*, 336 F. 2d 439 (8th Cir. 1964);

*Moore v. Mead Service Co.*, 190 F. 2d 540 (10th Cir. 1951);

*Ring v. Spina*, 148 F. 2d 647 (2d Cir. 1945);  
and cases *supra*, p. 22,

because it would be apparent that General Foods “was a victim, rather than a participant in the alleged conspiracy.”

*Hartford-Empire Co. v. Glenshaw Glass Co.*, 47 F. Supp. 711, 717 (W.D. Pa. 1931).

One cannot be tortfeasor and tortfeasee simultaneously.



IV.

Not Only Is CBS "Policy" Not a General Foods' Offense: Appellant Has Not Even Shown Any Policy on the Part of CBS to Exclude Independently Owned Shows: This Part of Appellant's Case Also Rests Entirely on Hearsay.

It is central to appellant's case that CBS has a policy of excluding shows which it does not own. Appellant then would saddle General Foods with responsibility for this policy of CBS on the theory that a customer of CBS who knows of this policy is somehow responsible for it. The theory is incomprehensible: as we have seen, the customer of a conspirator or a monopoly is not a co-conspirator: rather the contrary—he is the target of the conspiracy. At any rate, the existence of this CBS policy is the cornerstone of appellant's case against anyone. Not only is this policy legally irrelevant to appellee, whatever it may mean to CBS: the fact is there is a total failure to produce admissible evidence of the CBS policy.

That independents are excluded is challenged by Mr. Ebel's affidavit. He sets forth [Clk. Tr. p. 96, line 28; p. 97, line 1] that CBS runs for General Foods two programs in which CBS has no interest. What showing does appellant make to the contrary?

Although McGuire says, in general terms, that there is "practically no television series exhibited on network television" that the networks do not control [Clk. Tr. p. 196, line 7] his particulars are to the contrary. McGuire's affidavit identifies two television programs with which he was concerned, one known as "HENNESSEY" which was exhibited by CBS. [Clk. Tr. pp. 189-190.] He sets forth that

“. . . Neither defendant CBS nor defendant General Foods ever had any kind of ownership interest in this series. . . .” [Clk. Tr. p. 190, line 5].

He identifies a second program called “DON’T CALL ME CHARLIE”, which he indicates was run on NBC for one year. He says that “. . . NBC never had any ownership interest in this series.” [Clk. Tr. p. 190, line 24.] And as to General Foods, we have already pointed out that GOMER PYLE, and ANDREW GRIFFITH are independent shows.

None of this discloses any exclusion of independents. Indeed, merely between the parties to this lawsuit, it discloses four independent shows—and this without exploring third parties.

He then goes into his hearsay saga on McGHEE. And the statements he quotes say in plain terms that the reason CBS would not accept McGHEE was that CBS did not like the show. Thus [Clk. Tr. p. 194, line 16] he says: “Lee Rich advised me that Tom Dawson of CBS had advised him that James Aubrey of CBS did not like McGHEE and would not accept it for CBS; according to Mr. Rich, Mr. Dawson said to Mr. Rich that Mr. Aubrey’s only reason was that he, Aubrey, did not like the show.”

How does he reach the contrary conclusion?

He quotes his agent, Mr. Lastfogel, as saying: “. . . that James Aubrey was determined to force General Foods to buy CBS shows only. . . .” [Clk. Tr. p. 195, line 1.] But this is Lastfogel, plaintiff’s agent: this is not merely hearsay, it is opinion without the shadow of a foundation.



On what then is this claim based? Apparently it is based on the assortment of abstracts from Congressional Reports, and Administrative Reports, set forth at pages 34 through 65 of his brief, scattered in time from 1956 to 1966, including a 1956 letter from Mr. Donald Turner at a time when he represented a local television station. (Appellant's Br. p. 48.)

Part of this material is surely wrong, for as far back as 1956, it speaks of the disappearance of the independent—yet Mr. McGuire had HENNESSEY and DON'T CALL ME CHARLEY on the air within the past seven years. [Clk. Tr. pp. 189, 190.] The error should not surprise. *Ex parte* material of this sort is part of the political process: it is partisan in tone and necessarily variable in reliability. It is almost unnecessary to say that this sort of material is not admissible to establish a matter of fact in a lawsuit. The inadmissibility of precisely such reports was determined in *United States v. International Harvester Co.*, 274 U.S. 693, 702, 47 S. Ct. 748, 752, followed more recently on a related exclusion of evidence in this Circuit in *Olender v. U.S.*, 210 F. 2d 795, 802 (C.A. 9th 1954); and in *Aetna Portland Cement Co. v. F.T.C.*, 157 F. 2d 533, 550 (C.A. 7th 1946).

It remains even more fundamental, from General Foods' point of view, that such a policy, if established, would be a policy of the networks, *in opposition* to the advertisers, and no conspiracy. The alleged examples of exclusion of independents, set forth at pages 38 to 43 of appellant's brief, show CBS overruling Carter Products in the case of "YOU CAN'T TAKE IT WITH YOU" and CBS overruling Young and Rubicam in the case of FOUR STAR THEATRE. If

accepted this material may show CBS shoves its shows down its customers' throat: such forced feeding is the reverse of a conspiracy.<sup>3</sup>

V.

**The "Exclusive Dealing" Claim Is a False Quantity.**

It is a portion of appellant's theory that in some sense General Foods is "exclusive" to CBS. The claim is not true, but if the claim were true, its materiality is not apparent. What difference does it make to plaintiff whether General Foods gives its business to CBS, ABC, or Radio Luxembourg?

According to plaintiff each network has the same hostility to independent programs. Plaintiff says, quoting Congressional Reports, both here (Appellant's Br. p. 55), and before the trial court [Clk. Tr. pp. 225-226] that:

"In recent years (since about 1957-58) the market in which an independent television program producer can sell his product has been progressively contracted. The percentage of independently produced and financed programs in network schedules has declined sharply. Such programs have been crowded out of network schedules by program series—in many cases hour-length film segments

---

<sup>3</sup>The Congressional abstracts refer to Television Discount Patterns. This material is of course inadmissible under *United States v. International Harvester, supra*. In addition, it has no possible relevance. It is suggested by appellant that these discounts make General Foods "exclusive" to CBS. The discount quoted is 25% on sales of \$100,000 or more. (Appellant's Br. p. 45) General Foods' volume is such that on the discounts quoted, it could obtain them from more than one network: hence they would have no such effect. [See Clk. Tr. p. 96 for GF's actual expenditures with NBC and ABC.] In any event, as will be seen, the exclusiveness issue is a false quantity.



—supplied by ‘independents’ but financed and controlled, both economically and creatively by network managers. *On all networks in 1964, 93.1 percent of total evening hours (6 p.m. to 11 p.m.) was occupied by programs either produced or under the direct economic control of network managers. Only 6.9 percent was independently produced, financed, and licensed directly to advertisers.*” (Emphasis added.)

Consistently through his briefs, both here and at the trial court level, appellant has described the practice of which he complains as a practice of “the networks” (Appellant’s Br. pp. 34-63) without distinction between them. And his affidavit, general though it be, is even more plain. We quote: [Clk. Tr. p. 196, line 2.]

“33. Based on my years in the entertainment business, my financial involvement in the entertainment business, and my knowledge of the industry from personal observations, I know that the television networks over the past years have increased their ownership, financial interest, and control over television series exhibited during prime time until today *there is practically no television series exhibited on network television during prime time that is not financially controlled one way or another by the television network exhibiting the show.*” (Emphasis added.)

Since, according to appellant, all refuse to accept independently owned shows: since, he says, “there is practically no television . . . not . . . controlled . . .”, it could make no difference to appellant whether General Foods gave all its business to CBS or divided its busi-

ness between CBS, ABC, NBC and McGuire's claim that the networks are all the same makes nonsense of his question: why did not General Foods go to NBC? (Appellant's Br. p. 65.)

Factually, the claim that General Foods had agreed to give all its business to CBS does not give rise to a triable issue. The affidavit of Mr. Ebel, General Foods' vice president in charge of this area, set forth the following facts, nowhere contradicted by appellant:

"20. General Foods has never agreed with CBS to sponsor television shows and series during primetime exclusively on the CBS television network, nor has General Foods ever understood that it was not to buy 'talent and time' for primetime on any other television show." [Clk. Tr. p. 97.]

In addition, he set forth chapter and verse as follows:

"14. We are presently purchasing the following advertising time from networks other than CBS:

<u>Network</u>	<u>PRIME TIME</u>		<u>NON-PRIME TIME</u>	
	<u>Minutes</u>	<u>Value</u>	<u>Minutes</u>	<u>Value</u>
ABC	96	\$1,671,700	410	\$1,101,100
NBC	16	289,900	924	3,376,700

"15. In fiscal 1965, we purchased the following advertising time from networks other than CBS:

<u>Network</u>	<u>PRIME TIME</u>		<u>NON-PRIME TIME</u>	
	<u>Minutes</u>	<u>Value</u>	<u>Minutes</u>	<u>Value</u>
ABC	72	\$869,000	96	\$ 316,900
NBC	48	772,900	295	1,214,400

“16. In fiscal 1964, we purchased the following advertising time from networks other than CBS:

<u>Network</u>	<u>PRIME TIME</u>		<u>NON-PRIME TIME</u>	
	<u>Minutes</u>	<u>Value</u>	<u>Minutes</u>	<u>Value</u>
ABC	90	\$899,500	689	\$1,788,100
NBC	22	489,700	413	1,100,700

“17. General Foods has never agreed with CBS to monopolize television productions for the benefit of CBS (or otherwise). Such a monopoly would be seriously injurious to General Foods. In the past, such an arrangement would have prevented the development of two of our most effective advertising vehicles, THE ANDY GRIFFITH SHOW and GOMER PYLE, both of which were independently produced.” [Clk. Tr. pp. 96, 97.]

The only response is: [McGuire Affidavit Clk. Tr. pp. 195-196.]

“31. Sponsorship of television series means that the sponsor (advertiser) agrees to pay for ‘time and talent’ for the show for a set number of shows (usually 26). The sponsor also pays the advertising agency 15% of the time charges. The average cost for a one half hour television show are: \$70,000.00 for talent, \$80,000.00 for time, for a total of \$150,000.00. This means \$3.9 million for 26 weeks.

“32. There are distinct advantages to being a sponsor of a television series as distinguished from ‘spot sales.’ To name a few: (a) a sponsor identification with the show, e.g. Bob Hope-Chrysler Theatre; (b) some control over the content of the show, e.g. guest aproval, script approval; (c)



control of the license to the show; (d) financial control of the show, particularly in succeeding years; and (e) involvement in 'show business.'

"35. I have studied the ratings which reveal who is sponsoring what television series on what network during prime time, and they show that General Foods is a sponsor of record of television series during prime time only on the CBS television network."

The last, again, is pure hearsay. But in any event all it says is that General Foods puts its sponsored shows on CBS. But General Foods is free to place its business where it chooses: such evidence does not support the claim of an exclusive dealing agreement. (*Crawford v. Chrysler*, 338 F. 2d 934 (6th Cir. 1964.) General Foods' contracts with CBS were identified in discovery. [Clk. Tr. p. 151.] No showing was made of an exclusive dealing contract: as we have seen, there is none.

Finally, in this connection, it must be observed that even if CBS had exacted a clause denying to General Foods the right to go elsewhere (which is not true), the violation of the laws would be that of CBS, not General Foods.

The basic policy of the United States as to tying clauses, exclusive dealing agreements, and the like, is set forth in Section 3 of the Clayton Act (15 U.S.C.A. § 14), as follows:

"It shall be unlawful for any person . . . to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, . . . for use, consumption, or



resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.”

If an exclusive dealing agreement does not violate Section 3, it does not violate the antitrust laws at all.

*Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 335, 81 S. Ct. 623, 632 (1961);

*Standard Oil Co. v. United States*, 337 U.S. 293, 297, 69 S. Ct. 1051, 1054 (1949);

*Cf. Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 608-09, 73 S. Ct. 872, 880 (1953).

Section 3 of the Clayton Act palpably does not create a cause of action as against General Foods. In the first place it applies only to a “lease . . ., [or] sale or contract for the sale of goods, wares, merchandise, machinery, supplies, or other commodities. . . .” A contract for the sponsoring of television time or for the sale of advertising time or the like, is not a contract for the sale of goods, wares, merchandise, machinery, supplies, or anything else.

*CBS v. Amana*, 295 F. 2d 375 (7th Cir. 1961),  
*cert. den.* 369 U.S. 812, 82 S. Ct. 689 (1962).

In the second place, the statute applies solely to the seller. It is intended to protect the buyer. It says, to

repeat, “it shall be unlawful . . . to lease or make a sale . . . or fix a price . . . upon the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, . . . or other commodities of a competitor or competitors of the lessor or seller. . . .” It is the seller who “make(s) a sale.” By the same token, the condition forbidden is one which restricts the right of the buyer to “use or deal in the goods . . . of a competitor or competitors of the lessor or seller. . . .” Of record, up to the filing of this case, at least, the Government has never sought judicial relief against a buyer under Section 3 of the Clayton Act.

Precisely this problem is presented by the case of *Beloit Culligan Soft Water Service, Inc. v. Culligan, Inc.*, 274 F. 2d 29 (7 Cir. 1959).

In that case, Culligan had in its contracts a provision requiring its dealers not to purchase or deal in water softening products made by competitors of Culligan. This was part of the franchise agreement. In 1956 the Federal Trade Commission filed a complaint, to which Culligan agreed to a consent order, requiring the cessation of the use of such contracts. Culligan, Inc. then sought to avoid the franchise contracts with its dealers on the basis that, in view of the exclusive dealing provision, the contracts were illegal. It was held that the contract remained in effect as against Culligan, and the dealer could enforce it. In *Crawford v. Chrysler*, 235 F. Supp. 751, *affirmed* 338 F. 2d 934 (6th Cir. 1964), Chrysler decided, in a move toward greater efficiency, to reduce the number of independent transport companies which it would use for delivery of automobiles; to that end, Chrysler forced its dealers to engage only the remaining transport companies, one of



which was sued, along with Chrysler, by a rejected transport company. After finding no conspiracy of any sort, the court said of the defendant transport company that it had done no wrong: "all it did was try to get business, just like [plaintiff] Crawford was trying to get business." (*Id.* at 754.) And comparably in *Dailey v. Quality Schools Plan Inc.*, decided July 6, 1967 (C.A. 5th) reported at p. X5 Antitrust Regulation Reports No. 313, 1967 Trade Cases 72,153 the Fifth Circuit held that section 7 of the Clayton Act, forbidding certain acquisitions, applies only to the acquiring corporation.

There being no violation of Section 3 of the Clayton Act in the present case, the matter is disposed of. As is said in *Tampa Electric Co. v. Nashville Coal Co.*, *supra*.

"We need not discuss the respondents' further contention that the contract also violates § 1 and § 2 of the Sherman Act, *for if it does not fall within the broader proscription of § 3 of the Clayton Act it follows that it is not forbidden* by those of the former. *Times-Picayune Pub. Co. v. United States*, *supra*, 345 U.S. at pages 608-609, 73 S.Ct. at page 880." (Emphasis added.) (365 U.S. at 335.)

To sum up here:

(a) There is no issue as to existence of an exclusive dealing contract or tying agreement, for it was affirmatively shown, without contradiction, that there is none. Appellant has offered no evidence of such a clause.

(b) Such an agreement, if any, would be an anti-trust offense only on the part of the person exacting the tying clause (or exclusivity clause).

VI.

**Appellant's Complaints Concerning Want of Discovery Are Without Merit. Appellant Agreed to the Procedure Followed. Similarly, the Taking of Oral Testimony on a Motion for Summary Judgment Is Entirely Within the Court's Discretion.**

At page 18 of his brief, appellant recites that no discovery was had as to General Foods. Again, in urging that it was error not to allow the taking of oral testimony on the motion for summary judgment, appellant says that "no discovery of any kind was had as to appellee G.F." We are not clear whether appellant claims this want of discovery was an error or not (although it is not assigned as an error): hence, as a matter of caution, the following.

The procedure followed by the court was fixed by court order upon agreement by the parties. The Reporter's Transcript of Proceedings for Monday, April 18, 1966, covers the events. (Pp. 16-17.)

On that day, the motion for summary judgment came on for hearing. No affidavits had then been filed in opposition. McGuire, however, had interrogatories pending against CBS. He asked only that those be answered before argument, saying:

"He made the pilot. They liked the pilot. They didn't get it on. Nowhere in the General Foods' affidavits will you find that they took the show 'McGhee' made by my client and took it to another network to put it on. They can't take it to another network, is our allegation in the Complaint, because they are in fact exclusive to the defendant CBS.



“The interrogatories that we have asked CBS are right on these points. We asked them the question as to why the show was rejected. Are they exclusive? Are they written contracts?”

“So I feel that in the interest of justice and procedure I would suggest that first the court after hearing from Mr. Vaughn ascertain when CBS can file the answers to the interrogatories. They have filed objections to some on Friday. I haven’t yet received them. They are apparently at my office right now. Then set a new date on the objections to those interrogatories, those that they are objecting to, and then a week, two weeks, after the interrogatories are filed from the defendant CBS hear this motion for summary judgment.

*“If the court wishes I will hold off filing interrogatories on the defendant General Foods until after the court hears this motion for summary judgment.”*

“What I would prefer to do is to go ahead and file the interrogatories even on Defendant General Foods. I know they will need time. But I would give them *enough time to answer until after the court decides the motion for summary judgment.*”  
(Emphasis added.)

Counsel’s proposal, then, was to complete discovery against CBS: withhold discovery against General Foods, and argue the motion.

The proposal was agreed to. After a little intervening discussion on behalf of appellee, the court accepted appellant’s proposal. The discussion was as follows:

“The Court: As I understood it, Mr. Sheridan, you want to file some additional affidavits?”

“Mr. Sheridan: That is correct, your Honor.

“The Court: So that we are talking about arguments here based upon an incomplete file?

“Mr. Verleger: Yes.

“The Court: I think that we ought to have those affidavits on file and then argue it. It should be done within a reasonable time.

“I think Mr. Sheridan should refrain from any further discovery or any discovery as against General Foods.

“In all probability the information you are getting from your present interrogatories will be sufficient to permit you to file affidavits at least to the extent that we can get General Foods’ position in this case in focus.

“Mr. Sheridan: *Fine, Your Honor.*

“The Court: We can determine whether or not they are properly here, and if not release them. If so, you can go ahead with your discovery. So I don’t know that an extensive discussion of the facts at this time—” (Emphasis added.)

And at the conclusion of the discussion there appears:

“Mr. Sheridan: If I understand correctly, then, the defendant CBS will have its interrogatories filed by the 23rd of May.

“The Court: Yes.

“Mr. Sheridan: Then we will continue the hearing on the objections to the interrogatories by defendant CBS.

“The Court: Yes.

“Mr. Sheridan: Thank you, your Honor.

“The Court: And the plaintiff is not to conduct any further discovery against General Foods.

“Mr. Sheridan: *That is correct.* We will not.”  
(Emphasis added.)

The minute order followed the agreement of counsel, continuing the motion for summary judgment, and providing for no further discovery against General Foods. [Clk. Tr. p. 129.]

In addition, appellant contends that the trial court erroneously quashed subpoenas for oral testimony at the hearing on the motion for summary judgment. For much the same reasons, there is no merit in this claim.

There is no provision in Rule 56 for oral testimony on a motion for summary judgment. It provides for affidavits which may be “supplemented or opposed by depositions or further affidavits.” (F.R.C.P. 56(e).) Appellant is therefore relegated to Rule 43(e) which as to motions generally says that the court “*may* direct that the matter be heard wholly or partly on oral testimony or depositions.”

Doubt has been expressed as to whether 43(e) applies to motions for summary judgment, because use of oral testimony would deny the 10 day period otherwise allowed to respond. (*Chan Wing Cheung v. Hamilton*, 298 F. 2d 459 (1st 1962).) F.R.C.P. 43(e) expressly refers to oral testimony as well as affidavits and depositions: F.R.C.P. 56 only to depositions and affidavits, a difference which would seem to be intentional. In *Burnham Chemical Co. v. Borax Consolidated*, 170 F. 2d 569 (9th Cir. 948), this court allowed oral testimony in a motion for summary judgment, but the proceed-



ing appears to have been governed by stipulation. Assuming that 43(e) does apply, nothing is clearer than the use of the word “may” in 43(e). Whether to receive oral testimony on a motion is wholly discretionary with the court. *Urquhart v. American-LaFrance Foamite Corp.*, 144 F. 2d 542 (D.C. Cir. 1944); *Pennello v. Int. Bro. of Electrical Workers*, 223 F. Supp. 44 at 48 (D.C. Dist. Ct. 1963); *Dr. Beck & Co. v. General Electric Co.*, 210 F. Supp. 86 (S.D. N.Y. 1962); *Williams v. Minnesota Mining & Mfg. Co.*, 14 F.R.D. 1 (S.D.Calif. 1953).

In our case no real showing was made as to the need for oral testimony. In response to General Foods’ motion that oral testimony not be taken, McGuire filed only this response [Clk. Tr. p. 133]:

“Plaintiff Don McGuire opposes defendant General Foods motions to quash a subpoena and to prevent the taking of any testimony on the hearing of defendant General Foods’ motion for summary judgment on the following grounds:

“1. It is not an attempt to avoid the Court’s order to withhold discovery on defendant General Foods until after the hearing on the motion for summary judgment.

“2. The subpoena on Ebel is not unreasonable or oppressive.

“3. Plaintiff is entitled to attempt to show that there are material facts in dispute.

“4. Plaintiff should be allowed to cross-examine affiants and the Federal Rules of Civil Procedure so provide.”

Unless the court is under an obligation to receive oral testimony on *all* motions for a summary judgment, that is no showing at all. Doubtless, on a proper



showing, the court would have modified the prior order, entered by agreement, that discovery be withheld pending disposition of the motion for summary judgment. But vacation of that order was never even requested: in fact the paper last quoted seems to agree that the court's order *re* discovery should remain in effect and to assert that the subpoenas were not for discovery. And no application was even made, under Rule 56(f) for leave to take depositions before the motion was decided: indeed, as we have seen, it was agreed that appellant would complete his discovery against CBS, and have no discovery against General Foods.

## VII.

### **This Is a Plain Case for Summary Judgment.**

This is a case, wherein the only affidavits offered by appellant, hearsay though they be, furnish evidence that General Foods was not able to get his television program on television. And the only foundation for the claim of conspiracy is the claim that when General Foods found that CBS would not put "McGHEE" on the air, General Foods accepted what CBS had to offer. It is hard to imagine a less conspiratorial recital.

What then is said to the contrary? Pages 23 through 33 of appellant's brief collect authorities memorializing the reluctance of the courts, in inappropriate cases, to grant summary judgment. As a class, these cases hold that if there is an issue, whether it be an issue as to intent, or as to something else, summary judgment should not be granted. But where is the issue here? One cannot describe, as plaintiff has, a completely unambiguous, non-conspiratorial set of facts, and then assert that there is an issue simply by claiming that there is a question as to intent.

In *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 362 F. 2d 1008 (9th Cir. 1966), this court affirmed a summary judgment when affidavits showing a claimed conspiracy were not forthcoming. In that case, as appears from the decision on the prior appeal, *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F. 2d 1 (9th Cir. 1963), the charge was that there had been an agreement between Lucky and its distributors that none of them should carry Coors or any other competitive beer. Affidavits supporting that claim were not forthcoming, and the judgment affirmed, the court saying:

“The evidence presented does not show any contract, combination, or conspiracy to effect a group boycott; still less does it show any ‘unreasonableness’ in the restraint effected. At most it shows a condition to dealing unilaterally laid down by appellee, and appellee’s refusal to abandon that condition in various conversations between appellee and the individual distributors wherein those distributors attempted to obtain relinquishment of the condition. This, as our previous opinion shows, is not enough to establish liability under Section 1 of the Sherman Act.” (362 F. 2d at 1009.)

In exactly the same way, if we accept appellant’s affidavits, all they show is that CBS unilaterally refused to put McGHEE on television. Wherein then is the violation of the Sherman Act? Wherein is there any question of “intent” here?

Repeatedly running through appellant’s argument there appears the assumption that general allegations of conspiracy, in the complaint, are sufficient to raise an issue. For that reason, we presume appellant tabu-

lates the complaint and answer as an exhibit. But nothing could be more clear that under Rule 56(e), as amended in 1963, the opposition to a motion for summary judgment must contain "specific facts", based on "personal knowledge", about which "the affiant is competent to testify".

"More is required from an affiant than mere hearsay and legal conclusion."

*Doff v. Brunswick Corporation*, 372 F. 2d 801, 804 (9th Cir. 1967);

*Engelhard Industries, Inc. v. Research Instrumental Corp.*, 324 F. 2d 347 (9th Cir. 1963), cert. den. 377 U.S. 923, 84 S. Ct. 1220, 12 L. Ed. 2d 215 (1964);

*Washington v. Maricopa County*, 143 F. 2d 871 (9th Cir. 1944).

An affidavit must be on personal knowledge.

*S & S Logging Co. v. Barker*, 366 F. 2d 617, 624-625 (9th Cir. 1966).

The idea that a general allegation in the complaint is sufficient to prevent summary judgment was given specific burial by the adoption of Rule 56(e) of the Federal Rules of Civil Procedure: since the adoption of that rule, even in the circuits which formerly held a contrary view, it is clear that such general allegations have no effect.

*Dressler v. The MV Sandpiper*, 331 F. 2d 130 (2d Cir. 1964);

*Schwartz v. Associated Musicians of Greater New York, Local 802*, 340 F. 2d 228 (2d Cir. 1964);

*Erickson v. United States*, 340 F. 2d 512 (5th Cir. 1965).



*Dressler v. M.V. Sandpiper, supra*, is followed in *Poster Exchange, Inc. v. Paramount Film Dist. Corp.*, 340 F. 2d 320 (5th Cir. 1965), an antitrust case.

*Scarborough v. Universal CIT Credit Corp.*, 364 F. 2d 10 (5th Cir. 1966);

*Fitzgerald v. Westland Marine Corp.*, 369 F. 2d 499, 500 (2d Cir. 1966).

Again, at pages 65, and 68, appellant has collected cases dealing with the legality of exclusive dealing agreements or tying clauses. We need not attempt to analyze these—the record affirmatively shows without contradiction, as we have seen, that nothing of the sort exists here, and beyond that, that if there were such an agreement, the offense would be that of CBS.

Ours is a case where the appellant charges a conspiracy between CBS and each and every advertiser and each and every radio sponsor in the entire television industry. The sole basis for that charge, against everyone else, as against General Foods, apparently is that these companies patronize CBS. It can be hardly doubted that a general inquiry into the conduct of CBS with every advertiser, with every sponsor, from the beginning of time forbodes a lawsuit in which the process of discovery, if carried to a complete conclusion, will have a duration measured in the tens of years, and the trial measured in hundreds. It is worthy therefore to note the words of the Court of Appeals for the District of Columbia Circuit in *Washington Post Co. v. Keogh*, 365 F. 2d 965 (1966), at page 968:

“Summary judgment serves important functions which would be left undone if courts too restrictively viewed their power. Chief among these are avoi-



dance of long and extensive litigation productive of nothing, and curbing the danger that the threat of such litigation will be used to harass or to coerce a settlement.”

We can imagine no case more appropriate for the exercise of this power than the present one.

Respectfully submitted,

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*Attorneys for Appellee General Foods.*



### **Certificate.**

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

PHILIP K. VERLEGER





NO. 21645-A

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**United States  
Court of Appeals**  
for the Ninth Circuit

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MICHAEL PASTERCHIK,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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*On Appeal from the United States District Court  
for the District of Oregon*

---

**BRIEF OF APPELLEE**

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**FILED**

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**OCT 30 1967**

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United States  
Court of Appeals  
for the Ninth Circuit

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MICHAEL PASTERCHIK,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

---

*On Appeal from the United States District Court  
for the District of Oregon*

---

**BRIEF OF APPELLEE**

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**JURISDICTIONAL STATEMENT**

Appellee accepts Appellant's jurisdictional statement.

**STATUTES AND RULES INVOLVED**

18 U.S.C.A. §2312. Transportation of Stolen Vehicles:

“Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than \$5,000 or imprisoned not more than five years, or both.”

28 U.S.C.A. §2111. Harmless error:

“On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”

Federal Rules of Criminal Procedure, Rule 52(a).  
Harmless Error:

“Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.”

## COUNTER-STATEMENT OF THE CASE

On June 4, 1966, Agent Max Taylor of the Federal Bureau of Investigation received a telephone call from Phillip Atteberry, a bartender at the Portland Motor Inn, informing that a 1966 Thunderbird driven by a Dr. Michael Pasterchik might be a stolen vehicle (Tr.<sup>1</sup> 60, 61, 132, 138). Atteberry had observed that Michigan license plates, which were initially on the Thunderbird, had been replaced by Illinois plates during Pasterchik's stay at the Portland Motor Inn (Tr. 131-132, 134). He supplied the numbers of both sets of plates to Agent Taylor, but he had inadvertently transposed the numbers of the Illinois plates (Tr. 136).

Later that day Agent Taylor determined that the Federal Bureau of Investigation office in Denver had a file on Michael Pasterchik (Tr. 138). He also sent teletype messages to Denver, Detroit, and Springfield, Illinois, requesting information (Tr. 138, 139). On this same date, June 4, Agent Taylor received a reply teletype from the Detroit office of the Federal Bureau of Investigation, advising that the Michigan license plate reported by Atteberry was a dealer's plate which had been stolen from a Chrysler-Plymouth agency

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<sup>1</sup> As used hereafter, Tr. denotes the transcript of the proceedings below and R., the Record on Appeal.

(Tr. 136, 141, 144, 145). There was no report that a 1966 Thunderbird had been stolen (Tr. 145).

On this same date, Agent Taylor received a reply teletype from Denver informing that Pasterchik had been recently released from the United States Penitentiary at Leavenworth, Kansas, and that he was currently under investigation (Tr. 142). Again on June 4, Agent Taylor received a reply teletype from Springfield, Illinois, advising that the Illinois license plates reported by Atteberry had been issued to a vehicle other than the 1966 Thunderbird and that there had been no theft report concerning them (Tr. 143). From this information, Agent Taylor determined that the Illinois license number supplied by Atteberry was incorrect (Tr. 136, 151).

On June 5, Agent Taylor sent a second teletype to Denver, Detroit, and Springfield requesting additional information (Tr. 144). On June 6, a teletype was received from Denver, advising that Pasterchik was involved in a theft at Phoenix, Arizona, of a 1966 Mustang, which was left at Denver (Tr. 146). The Portland Federal Bureau of Investigation office was further advised that the Phoenix Police Department had a grand theft auto and embezzlement warrant for Pasterchik in connection with the Mustang (Tr. 146). The Phoenix Police Department was informed by phone that Pasterchik was in the Portland area, and



an unlawful flight process was issued in the District of Arizona (Tr. 146).

At 3:00 P.M., on June 6, after receipt of the above information, Special Agents Taylor and Ralph Himmelsbach, accompanied by Lake Oswego Police Chief Lyle Perkins, arrived at the Lake Oswego residence of Iris Dorsey Fortney, where Pasterchik had been staying for approximately a month (Tr. 18, 64, 86, 100). The agents noticed a Thunderbird in the garage similar to that described by Atteberry (Tr. 24, 75). The car had no license plate on the front (Tr. 59). The agents knocked at the front door, and through a window they observed Pasterchik sitting at a table with Mrs. Fortney and her daughter (Tr. 19, 64).

After Pasterchik opened the door, the agents identified themselves and arrested Pasterchik for unlawful flight to avoid prosecution. He was standing in the doorway at that time (Tr. 19, 64). Pasterchik told the agents he wanted to get dressed, as he was not wearing a shirt or shoes, and he asked the agents not to reveal their identity to Mrs. Fortney (Tr. 19-20, 64). The agents accompanied Pasterchik inside the house to a bedroom on the main floor, where he dressed under their observation (Tr. 20, 64). Pasterchik attempted to leave his billfold on the dresser, but he was told to bring it with him (Tr. 20, 64-65). The agents then left the Fortney residence. They did not tell Mrs.

Fortney at that time that they had arrested Pasterchik (Tr. 20, 65).

Pasterchik was handcuffed in the FBI car and was advised of his rights according to the *Miranda* decision (Tr. 66). Pasterchik acknowledged that he understood his rights, and he did not give any statements to the arresting officers (Tr. 66). He was immediately taken to the United States Courthouse and there arraigned on the charge of unlawful flight to avoid prosecution by Chief Judge Gus J. Solomon, acting as United States Commissioner (Tr. 21, 67). Pasterchik was then placed in the custody of the Marshal, and the contents of his billfold were examined and itemized at the Marshal's Office (Tr. 22, 67). A check for \$200, signed by Pasterchik, and a Selective Service card in the name of Dr. Michael Pasterchik were taken from the wallet (Tr. 23, 114). The billfold and the rest of its contents were returned to the Marshal (Tr. 23, 68).

At 5:00 P.M., a telephone call was received from Atteberry, who was at Mrs. Fortney's house and who also was a mutual friend of Mrs. Fortney and Pasterchik (Tr. 24, 91). Agents Taylor and Himmelsbach returned to the Fortney residence at 7:00 P.M. (Tr. 24, 76-77, 261). Mrs. Fortney signed a consent to search form after she was advised of her constitutional rights (Tr. 25-26, 69, 91-92, Government's Exhibit No. 30).



The agents searched the bedroom of Mrs. Fortney's daughter, where Pasterchik kept his clothes (Tr. 26, 69-70, 88, 93). On top of the bedroom dresser, in plain sight, were a number of cards and papers (Tr. 27, 71). These were taken and Mrs. Fortney was given a receipt for them (Tr. 95). Included in these items were a purchase order for Dr. Joseph Roach, Livonia, Michigan, for a 1966 Thunderbird, license number 368D19; a Shell Oil Company credit card in the name of Cregar Pickwick; a Michigan license registration for a 1966 Thunderbird, number 368D19, assigned to Dr. Joseph Roach, Livonia, Michigan; and five blank Michigan license registration cards (Tr. 29-31). It has previously been determined that Michigan license number 368D19 had been stolen from a Michigan Chrysler-Plymouth dealer. These items were the subject of a motion to suppress, which was denied (R. 21, Tr. 29-31, *United States v. Pasterchik*, 267 F. Supp. 44 (D.C. Oregon, 1966)). They were later received in evidence during Pasterchik's trial (Tr. iii, 272).

The attic where Pasterchik slept was also searched, but nothing was taken (Tr. 31, 72, 87, 95). The agents then went to the garage, where Mrs. Fortney identified the parked Thunderbird as belonging to Pasterchik (Tr. 55-56). She stated she had limited permission to drive the car (Tr. 88). Mrs. Fortney then opened the trunk with a key from a set she had taken off the dresser in her daughter's bedroom (Tr. 32, 72). She had

used these keys before to drive the car under Pasterchik's permission (Tr. 96).

In the trunk the agents found an Illinois license plate, number HC-7728, and a Michigan license plate, number 368D19 (Tr. 33). The two plates were seized, and Mrs. Fortney was given a receipt for them (Tr. 73). The Michigan plate was later received in evidence during Pasterchik's trial (Tr. 264).

On June 10, Pasterchik's wallet was seized under authority of a search warrant by Agent Taylor at the Multnomah County Jail, where Pasterchik was incarcerated (R., Tr. 114, 115). The wallet and its contents were received for the purpose of a hearing regarding the defendant's motion to suppress (Tr. iii, 114). However, neither the wallet nor any of its contents were received in evidence during Pasterchik's trial (Tr. iii). The various identification cards received in evidence during the trial came from the top of the dresser in the bedroom of Mrs. Fortney's daughter, and were included in Government Exhibit Numbers 4-23 (Tr. iii, 29-31).

Pasterchik was subsequently indicted by the Federal Grand Jury on June 13, 1966, for the interstate transportation of a stolen motor vehicle (R.1). The 1966 Thunderbird in Pasterchik's possession was owned by the Hertz Corp.; had been rented by an individual using the name of Cregar Pickwick on April 7,



1966, at Chicago, Illinois, to be returned to Hertz on April 8, 1966 (Tr. 163, 164). No permission was given to take the car out of the state (Tr. 177). Among Pasterchik's effects introduced into evidence was a Shell credit card issued to Cregar Pickwick (Tr. 188), and numerous Shell credit card invoices signed Cregar Pickwick were introduced showing purchases of gas by one Cregar Pickwick from Illinois to Oregon (Tr. 273). Cregar Pickwick is a firm name not belonging to any particular individual, and Appellant had not been authorized to use the credit card (Tr. 186, 187). After a trial by jury, Pasterchik was found guilty as charged on November 9, 1966 (R. 25). He was sentenced to five years on November 30, 1966.

## **ARGUMENT**

### **I**

#### **SEARCH AND SEIZURE OF CERTAIN OF APPELLANT'S PERSONAL EFFECTS IN THE FORTNEY HOUSEHOLD WAS PROPER PURSUANT TO MRS. FORTNEY'S CONSENT TO SEARCH HER HOUSE.**

Appellant complains of the search of his effects in Mrs. Fortney's house pursuant to her written consent. Appellant was a non-paying guest in her house, and his effects were in a room occupied by her infant daughter and sporadically by a Mrs. Haney, a friend of Mrs. Fortney. Appellant slept in the attic. The items

complained of were in plain sight on the top of a dresser in this room (Tr. 27, 71). Appellant concedes there is some authority upholding the propriety of such a search and cites *Woodard v. U.S.*, 254 F.2d 312, U.S.D.C. D.C. (1958), and *Calhoun v. U.S.*, 172 F.2d 457, (C.A. 5, 1949). See also *Maxwell v. Stephens*, 348 F.2d 325, (C.A. 8, 1965). He cites no authority in support of his position. It is submitted that under the facts of this case the search was proper.

## II

### THE SEARCH OF APPELLANT'S WALLET WAS INCIDENT TO HIS ARREST.

As stated above, Appellant was arrested in Mrs. Fortney's house; taken to the Federal Courthouse; immediately arraigned before a District Judge acting as a commissioner; and then taken to the Marshal's Office where his billfold was searched. This whole process took between thirty and forty-five minutes (Tr. 21). Under the circumstances, the search was made within a reasonable time of his arrest. *Baskerville v. U.S.*, 227 F.2d 454 (C.A. 10, 1955); *Charles v. U.S.*, 278 F.2d 386 (CA 9, 1960). In any event, none of the items from the billfold were introduced into evidence at trial (Tr. iii), and, consequently, there could have been no prejudice. The point is therefore moot.

## III

**APPELLANT'S ARREST WAS BASED ON PROBABLE CAUSE.**

The question as regards probable cause to arrest appellant on the Unlawful Flight charge has been dealt with extensively by the trial judge in *U.S. v. Pasterchik*, 267 F. Supp. 44 (1966). Prior to arresting appellant, the FBI had been advised by their Phoenix office that a grand theft and embezzlement warrant had been issued for appellant by the local Phoenix authorities, and also a Federal unlawful flight warrant based on these charges (Tr. 146). They had previously been advised where he was staying and what kind of car he was driving. After the agents had knocked on the front door of the Fortney residence, Appellant opened it and admitted having the same name as the person named in the warrant (Tr. 19). In addition, the agents saw a car in the carport which answered the description of the car which they had been previously advised Appellant was driving. It is difficult to see lack of probable cause under the above facts. Appellant claims he requested a hearing re probable cause at the initial proceeding (presumably the arraignment before the District Judge acting as Commissioner) on the day of his arrest. There appears to be nothing in the record regarding this, but Appellant in effect had this hearing during his motion to suppress (Tr. 1-157), and the Court found properly that probable cause existed.



## IV-A

**SEARCH OF APPELLANT'S AUTOMOBILE WAS BASED ON PROBABLE CAUSE AND THEREFORE REASONABLE UNDER THE CIRCUMSTANCES.**

The whole background of facts prior to appellant's arrest and the search of the vehicle pointed to the stolen status of the car. The car had used different sets of plates from different states, one of which was stolen. A grand theft auto charge was outstanding against Appellant in Arizona. Subsequent to his arrest and prior to the search of the vehicle, a purchase order for the vehicle was found on the dresser in Mrs. Fortney's home using the stolen Michigan license number (Government's Ex. 9), together with a Michigan Registration for license number 368D19 (Government's Ex. 18), the number reported stolen, issued to another individual. In addition, Mrs. Fortney, who had permission to use the vehicle, provided the keys and opened the trunk (Tr. 32, 76, 92). Certainly, under these circumstances, the agents had probable cause to believe the car to be stolen, and under all the circumstances the search without a warrant was justified; if indeed this be such, considering Mrs. Fortney's involvement.

It is realized that *Preston v. U.S.*, 376 U.S. 364, and this Court's opinion in *Cotton v. U.S.*, 371 F.2d. 385 (1967), may appear to differ. However, as pointed out in *Preston*, there is a common sense difference be-



tween a house and a car as regards necessity for a search warrant, and the test is always "was the search reasonable" (Pg. 366). And in *Cooper v. California*, 386 U.S. 58 (1967), after distinguishing *Preston*, the Court said at page 62:

"It is no answer to say that the police could have obtained a search warrant, for 'the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable'."

In *Cotton*, this Court pointed out at page 391:

"We do not intimate that the police may not, if they have probable cause, take a stolen car from the thief and return it to its owner."

It might be argued if they have the right to take it and return it to its owner, they have the right to search without a warrant, at least under the facts set out above.

#### IV-B.

**IF DEEMED TO BE UNREASONABLE, THE ONLY EVIDENCE GAINED THEREBY AND INTRODUCED INTO EVIDENCE WAS NON-PREJUDICIAL AND CUMULATIVE ONLY, AND ANY ERROR THEREFORE HARMLESS.**

The only evidence incident to the search of the car introduced against Appellant at trial was the Michigan license plate (Government's Exhibit 24). This Court has already held in *Cotton* that it is proper, without a

warrant, to check a vehicle's identification numbers. It is submitted that the license plate is merely cumulative when considered with Government's Exhibit 50 (Appellant's motel registration slip containing notation of stolen license number), Government's Exhibit 9 (bill of sale with notation of number), and Government's Exhibit 18 (Michigan registration for that number). Also the fact that this Michigan license number had been reported stolen was brought out by Appellant in his cross-examination of Special Agent Taylor (Tr. 250, 261), not during the Government's direct examination. Therefore, if there was error in admitting the license plate, it was cumulative only, and harmless beyond all reasonable doubt. *Chapman v. California*, 386 U.S. 18, 22, 24 (1967), applying 28 U.S.C. §2111 and F.R.C.P. 52(a). See also *Granza v. U.S.* 377 F.2d 746, 749 (C.A. 5, 1967), and *Ware v. U.S.* 376 F.2d 717, 719 (C.A. 7, 1967), applying the rule set forth in *Chapman*.

**CONCLUSION**

It is respectfully submitted appellant's conviction should be affirmed.

**CERTIFICATE**

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Date: .....<sup>27<sup>th</sup></sup>..... day of October, 1967.

**MICHAEL L. MOREHOUSE**  
*Assistant United States Attorney*  
*District of Oregon*



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**United States  
Court of Appeals**  
for the Ninth Circuit

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MICHAEL PASTERCHIK,

*Appellant,*

vs.

UNITED STATES OF AMERICA,

*Appellee.*

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*On Appeal from the United States District Court  
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**BRIEF OF APPELLEE**

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**FILED**

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SEP 15 1967

WM. B. LUCK, CLERK



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United States  
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MICHAEL PASTERCHIK,

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---

*On Appeal from the United States District Court  
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---

**BRIEF OF APPELLEE**

---

**JURISDICTIONAL STATEMENT**

The jurisdiction of the United States District Court for the District of Oregon was based on 18 U.S.C.A. 3231. The indictment charged offenses against the laws of the United States, 15 U.S.C.A. § 902 (e) and (g). This Court has jurisdiction by virtue of 28 U.S.C.A. 1291.

## STATUTES AND RULES INVOLVED

15 U.S.C.A. § 902. Transporting, shipping, or receiving firearms or ammunition in interstate or foreign commerce; acts prohibited

“(e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.”

\* \* \*

“(g) It shall be unlawful for any person to transport or ship or cause to be transported or shipped in interstate or foreign commerce any stolen firearm or ammunition, knowing, or having reasonable cause to believe, same to have been stolen.”

18 U.S.C.A. Chapter 213 — Limitations § 3282.  
Offenses not capital

“Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.”

18 U.S.C.A. Federal Rules of Criminal Procedure  
Rule 48. Dismissal

“(b) By Court. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint.”



## COUNTER-STATEMENT OF THE CASE

While awaiting trial for a Dyer Act violation (CR 66-137, 21645-A), the appellant was indicted by the Federal Grand Jury for the interstate transportation of a firearm by a felon and the interstate transportation of a stolen firearm on October 7, 1966 (R<sup>1</sup> 1, Tr. 40). After waiving a jury (R. 5), the appellant was found guilty of both counts of the indictment by the Honorable John F. Kilkenny, District Judge, on December 13, 1966 (Tr. 95, 100). On the same day, the appellant was sentenced to three years imprisonment on each count, to run concurrently with each other, and consecutively to the five year sentence imposed on the appellant's Dyer Act conviction (R. 14, Tr. 103).

While staying for a few days during April, 1966, at Donner's Trail Ranch in Verdi, Nevada, the appellant became friendly with Anthony Marcewicz (Tr. 45, 50). Marcewicz owned a 22 caliber "Junior Colt" pistol, which he had purchased at the Verdi Gun Shop in Verdi, Nevada (Tr. 43, 46, and 55; Government Ex. No. 25-D).

One day after their newly acquired friendship, the appellant asked to borrow Marcewicz's pistol (Tr. 47). Appellant stated he was going on a walk with three women, including Marcewicz's mother, and wanted to

<sup>1</sup> As used hereafter, Tr. denotes the transcript of the proceedings below; A.Br. the appellant's brief; R. the record on appeal.

do some shooting (Tr. 51). Marcewicz loaned the gun to the appellant on the condition that it be returned after the walk; he did not intend to sell or give it permanently to the appellant (Tr. 47, 52).

The appellant was gone the next day (Tr. 52, 53). Marcewicz did not see his gun or appellant until he identified both at appellant's trial (Tr. 46, 47; Government Ex. No. 25). The permanent taking was without Marcewicz's permission (Tr. 47).

The appellant met Iris Dorsey Fortney during early May, 1966, in Portland, Oregon, and shortly thereafter moved into her house in Lake Oswego, Oregon (Tr. 57, 63). Two days after they had met, Mrs. Fortney saw the appellant take out an object resembling a pistol from the jockey box of his car (Tr. 57, 62).

On either the 5th or 6th of June, the appellant told Mrs. Fortney (Tr. 58, 63): "Watch that (appellant's shaving kit). It is loaded." Upon looking into appellant's shaving kit, Mrs. Fortney found a pistol, which she later testified was the same as Government Ex. No. 25 (Tr. 59).

At approximately 3:00 PM on June 6th, Mrs. Fortney saw two strange men, who she assumed to be law enforcement officers, talking to the appellant (Tr. 60, 68). They later turned out to be FBI agents who had arrested the appellant (Tr. 14).



Mrs. Fortney feared possible gun play and hid the gun (Tr. 60, 68). She later gave the gun to Phillip Atteberry, who in turn gave it to Special Agent Max Taylor of the FBI (Tr. 61, 74, and 78). Both men testified that this gun was the same as Government Ex. No. 25 (Tr. 78, 85).

## ARGUMENT

### I

**THE EVIDENCE IS SUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDINGS THAT THE APPELLANT KNOWINGLY TRANSPORTED A STOLEN FIREARM IN INTERSTATE COMMERCE, AS CHARGED IN COUNT II OF THE INDICTMENT.**

Appellant asserts there is insufficient evidence to support his convictions. In judging the sufficiency of the evidence, all conflicts are to be resolved against the defendant-appellant, and the evidence, including all reasonable inferences therefrom, must be viewed by this court in a light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *Byrnes v. United States*, 327 F.2d 825, 830 (C.A. 9, 1964). Thus the appellant's contention that he should have "the benefit of the doubt" on appeal (A.Br. 9) is without merit.

An examination of the record reveals that the testimony of the government's witnesses was clearly sufficient to warrant the trial court in finding that the appellant had knowingly transported a stolen firearm

in interstate commerce. The appellant had asked to use Marcewicz's pistol while in Nevada. Marcewicz loaned it to the appellant on the express condition that it be returned after its use. The appellant disappeared the next day and the gun was never returned. This taking was without Marcewicz's permission. The same gun was next seen in the appellant's shaving kit in Lake Oswego, Oregon, two months later.

From these facts and any reasonable inferences therefrom, it was proper for the court to determine that the gun had been stolen and that it had been transported across state lines. *Ziegler v. United States*, 254 F.Supp. 199, 202 (D.C. Montana, 1966) and *United States v. Thompson*, 261 F2d 809, 812 (C.A. 2, 1958). The government's evidence here was circumstantial; but it was uncontradicted and positive as to the guilt of the appellant.

This court does not weigh the evidence or test the credibility of the witnesses. *Glasser v. United States*, supra at 80. A trial judge's decision on a matter of fact, which is supported by evidence which he deems credible, should not be set aside by an appellate court even though that court might come to an opposite conclusion from a reading of the record. *United States v. Ziemer*, 291 F.2d 100, 102 (C.A. 7, 1961).

Absent an abuse of discretion, and none here is charged or revealed by the record, this court will ac-



cept the results reached by the district court, trying the case without a jury, insofar as a determination of the fact is concerned. *United States v. Jones*, 302 F.2d 46, 47 (C.A. 7, 1962). In this case, there is substantial evidence to support the findings of the trial court. *Joseph v. Donover Company*, 261 F.2d 812, 817 (C.A. 9, 1959).

## II

### **THIS COURT NEED NOT CONSIDER APPELLANT'S CONTENTIONS OF ERROR CONCERNING COUNT I OF THE INDICTMENT.**

The propositions for which appellant relies upon *Gravatt v. United States*, 260 F.2d 498 (C.A. 10, 1958) and *Matula v. United States*, 327 F.2d 337 (C.A. 10, 1964) (A.Br. 11) carry great merit. Nevertheless, the appellant's conviction on Count I of the indictment must be affirmed. The sentence under Count I runs concurrently with that imposed under Count II (Tr. 103). The major legal question raised on this appeal is the sufficiency of the evidence to prove the two crimes charged. This court has held in numerous cases that where there is sufficient evidence to support one count, as in Count II here, the convictions on the other counts must also be affirmed, in view of the concurrent sentences imposed. *Byrnes v. United States*, 327 F.2d 825, 830 (C.A. 9, 1964); *Stein v. United States*, 337 F.2d 14, 17 (C.A. 9, 1964); *Mendez v. United States*, 349 F.2d 650, 652 (C.A. 9, 1965); *Cervantes v.*

*United States*, 347 F.2d 206, 207 (C.A. 9, 1965).

Therefore, this court need not consider the appellant's contentions regarding Count I, no matter how much merit they may have.

### III

#### **THE APPELLANT WAS NOT PREJUDICED IN ANY WAY BY THE RETURN OF THE INDICTMENT ON OCTOBER 7, 1966.**

The appellant was arrested by F.B.I. agents for unlawful flight to avoid prosecution in Lake Oswego, Oregon, at approximately 3:00 P.M. on June 6, 1966, and was arraigned on that charge later in the afternoon (Tr. 17, 18, and 21, for CR. 66-137, No. 21645-A consolidated on appeal). On June 13, 1966, the appellant was indicted for the interstate transportation of a stolen vehicle (R. 1 for CR. 66-137, No. 21645-A, Tr. 40). On June 22, the appellant was arraigned on the Dyer Act charge and trial was set for the week of October 10th (R. 9, No. 21645-A). While awaiting trial on the Dyer Act charge, the appellant was indicted for interstate transportation of a stolen firearm and the interstate transportation of a firearm by a felon on October 7, 1966 (R. 1 for 21645-B). The appellant was tried on December 13, 1966. The appellant was held in custody continuously since his initial delivery to the United States Marshal in early June (Tr. 40).



A criminal defendant's right to a speedy trial guaranteed by the Sixth Amendment and implemented by Rule 48 (b) of the Federal Rules of Criminal Procedure, 18 U.S.C.A., does not arise until after a prosecution is instituted against the accused. *D'Aquino v. United States*, 192 F.2d 338, 349-350 (C.A. 9, 1951); *Venus v. United States*, 287 F.2d 304, 307 (C.A. 9, 1960). Any delay occurring between the commission of the offense and the commencement of the prosecution is controlled exclusively by the applicable statute of limitations. *Nickens v. United States* and cases cited therein, 323 F.2d 808, 809 (C.A.D.C., 1963).

No claim is advanced by the appellant that he was arrested, detained, or held in custody for the offenses charged in the two counts of the present indictment, prior to the return of that indictment. In fact, the appellant was in custody awaiting trial on a completely separate Dyer Act offense (Tr. 40). The appellant's argument seems to be that he should have been indicted sooner for the firearm offenses. There is no merit to this contention, for the right to a speedy trial contemplates a pending charge and not the mere possibility of a criminal charge. *Parker v. United States*, 252 F.2d 680, 681 (C.A. 6, 1958), cert. den. 356 U.S. 964.

Since the indictment was returned within the allowable statutory period, 18 U.S.C.A., § 3282, the *only*

delay which the appellant can complain of is the lapse of time between the return of the indictment and the trial. *Harlow v. United States*, 301 F.2d 361, 366 (C.A. 5, 1962). The indictment was returned on October 7, 1966, and the appellant was tried and found guilty as charged on December 13, 1966. By no stretch of the imagination can this period of time be called an unreasonable delay or even a delay at all. The standards of prejudice, oppression, and wilfull procrastination are not met here. *Pollard v. United States*, 352 U.S. 354, 361 (1956). Furthermore, even if there were an unreasonable delay between the two above-mentioned occurrences, the appellant would be in no position to complain, since he never demanded an earlier trial. *United States v. Ettelt*, 334 F.2d 813, 815 (C.A. 7, 1964).

The District Court's ruling on this matter is in the record below (Tr. 40) and is now part of the record on appeal (A.Br. 11). The District Court, without a trace of unreasonableness or arbitrariness, used its sound discretion in denying appellant's motion to dismiss the indictment. *Nickens v. United States*, *supra* at 811.

#### IV

#### THE COURT'S ORDER DENYING APPELLANT'S MOTION TO SUPPRESS THE FIREARM SHOULD BE AFFIRMED.

The appellant is asking this court to reverse the



lower court's order denying his motion to suppress the firearm (A.Br. 12). As the appellant did not specifically assign this as error in his argument, the government will rely upon the facts and conclusions of law stated in that order (R.11).

## CONCLUSION

It is respectfully submitted that:

1. The order denying appellant's motion to suppress the firearm should be affirmed, for the reasons stated in that order (R. 11).
2. The order denying the appellant's motion to dismiss the indictment should be affirmed.
3. The appellant's convictions on both counts of the indictment should be affirmed.

**CERTIFICATE**

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

Date: .....<sup>14<sup>th</sup></sup>..... day of *September*..., 1967.

**SIDNEY I. LEZAK**  
United States Attorney  
District of Oregon



















